Supreme Court, U.S.
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No. _____ 00

In The

Supreme Court of the United States

JAMES BENNETT, in his official capacity as Secretary of State of Alabama, et al.,

Appellants,

v.

PEGGY KELLEY, et al.,

Appellees.

On Appeal From The United States District Court For The Middle District Of Alabama

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the District Court err in concluding that white residents of white-majority legislative districts established standing under *United States v. Hays*, 515 U.S. 737 (1996), to bring claims of unconstitutional racial gerrymandering when they pointed to adjoining black-majority districts and otherwise failed to show a personalized injury?

2. Did the District Court err in refusing to apply laches as a bar to the Plaintiffs' claims?

3. Did the District Court err in rejecting the Alabama Supreme Court's conclusion, reached after briefing by the parties, that *Shaw* claims like those of the Plaintiffs are moot?

4. Did the District Court err in adjudicating the merits of a *Shaw* redistricting case where no relief within the confines of Alabama's system of government was workable?

5. Did the District Court err in concluding that Alabama State Senate districts 21, 25, 29, and 30, and Alabama House of Representatives districts 63, 75, and 86, are the products of unconstitutional racial gerrymandering?

PARTIES TO THE PROCEEDINGS

A. Parties To This Proceeding.

Appellant James Bennett is the Secretary of State of Alabama. He was named, in his official capacity, as a Defendant below. Appellant, The State of Alabama, was also named as a Defendant below.

Appellants Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon, and Andrew Hayden are African-American voters of Alabama. They were also named as Defendants below. Throughout the proceedings, they have been represented by their own counsel. They filed their own notice of appeal and will file their own Jurisdictional Statement. The State Appellants and the Sinkfield Appellants will, however, jointly file an Appendix.

Sinkfield, Ross, Brooks, McKinnon, and Hayden were also the plaintiffs, individually and as the representatives of a class of African-American voters of Alabama, in the case styled *Sinkfield v. Camp*, Civil Action No. 93-689-PR, in the Circuit Court of Montgomery County, Alabama. In 1993, that case produced the legislative districting plan that was challenged by the Kelley Plaintiffs in this case.

Appellees Peggy C. Kelley, Daniel P. Brown, W. Ricardo Montiel, Karen D. Outlaw, Bibb Gunter, and Genae Spinks (the "Kelley Plaintiffs") are white residents of Alabama. They brought *Shaw*-based racial gerrymandering claims against the Alabama State Senate and State House of Representatives districts in which they live. The District Court ruled that one or both of their respective

PARTIES TO THE PROCEEDINGS – Continued

districts was unconstitutional and enjoined further elections in those districts as currently configured.[1]

B. Former Parties.

Hal Smith was also named as a Defendant below, in his official capacity as Probate Judge of Lee County, Alabama, but the claims against him were dismissed prior to judgment.

Kelly Brasher, Ann G. Hunter, Gonzalo F. Montiel, Camilla Rice, and John Rice, all white residents of Alabama, were Plaintiffs below but are not parties to this appeal. Brasher and Hunter voluntarily dismissed their claims before judgment. The District Court ruled against Montiel and the Rices before trial, and they did not cross-appeal.

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[1] The State Defendants do not agree, however, that the Kelley Plaintiffs are "prevailing parties" within the meaning of *Farrar v. Hobby*, 506 U.S. 103 (1992).

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JURISDICTIONAL STATEMENT

James Bennett, in his official capacity as Secretary of State of Alabama, and the State of Alabama, defendants below, appeal from the Final Judgment and Injunction of the United States District Court for the Middle District of Alabama, entered April 24, 2000, in which the District Court declared that Alabama Senate districts 21, 25, 29, and 30, and Alabama House of Representatives districts 63, 75, and 86, are the unconstitutional products of racial gerrymandering and enjoined Bennett from conducting any elections for those districts without the court's prior approval.

OPINIONS BELOW

The April 24, 2000, majority opinion of the District Court and the dissenting opinion of United States District Judge Myron H. Thompson are published at 96 F. Supp. 2d 1301 (M.D. Ala. 2000). They appear in the Appendix at 1a and 54a, respectively. Previous decisions from earlier phases of this and related litigation are included in the Appendix and include, *inter alia*, those reported at *Thompson v. Smith*, 52 F. Supp. 2d 1364 (M.D. Ala. 1999); *Rice v. Sinkfield*, 732 So. 2d 993 (Ala. 1998), and *Rice v. Smith*, 988 F. Supp. 1437 (M.D. Ala. 1997).

JURISDICTION

The District Court's judgment was entered on April 24, 2000. Bennett and the State of Alabama filed notice of appeal to this Court on May 23, 2000. App. at 91a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253 (1994).

CONSTITUTIONAL PROVISION INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment, which is reprinted in the Appendix at 373a.

STATEMENT OF THE CASE

This case involves *Shaw*-based challenges to the districting plan for the Alabama Legislature. That plan was adopted in 1993, and elections under it were held in 1994. No challenge was made until May 1997. While that challenge was pending, the last elections under that plan were held in 1998. The challenge did not come to trial until January 2000, and was not ruled on until April 2000. The District Court declined to order special elections, in November 2000[2] or otherwise, but did enjoin the State from holding any more elections in four State Senate districts and three State House districts under the current plan. In ordering this relief, the District Court rejected the State's contentions that the Kelley plaintiffs lacked standing, that their claims were barred by laches, that their claims were moot, and that relief was futile, as well as the State's defenses on the merits. The State renews each of those defenses in this appeal.

A. Legal Proceedings.

1. The Rice Plaintiffs Challenge The Reed-Buskey Plan.

Alabama's current legislative districting plan is known as the Reed-Buskey plan. The Reed-Buskey plan was adopted through a consent judgment entered by the Circuit Court of Montgomery County in 1993 in a case styled *Sinkfield, et al. v. Camp*. "Camp" was Billy Joe Camp, then the Secretary of State of Alabama, and the Sinkfield parties were Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon, and Andrew Hayden, individually and as the representatives of a class of African-American voters (the "Sinkfield Defendants").

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[2] Such elections would have been interim elections because the legislature serves four-year terms, and the next elections for the legislature are not scheduled until November 2002.

The Circuit Court of Montgomery County entered a "Partial Consent Judgment Regarding Legislative Redistricting and Requiring Voting Rights Act Preclearance" on May 11, 1993. In the Partial Consent Judgment, the Circuit Court retained jurisdiction to enforce the decree and order further relief until a lawful plan had been adopted and precleared in accordance with Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1994). While preclearance was pending, this Court decided *Shaw v. Reno*, 509 U.S. 630 (1993). On August 13, 1993, after preclearance had been obtained, the Circuit Court entered a "Final Judgment Concerning Legislative Redistricting," in which it, *inter alia*, finally approved the Partial Consent Judgment.

On May 2, 1997, John and Camilla Rice, for themselves and on behalf of a class of non-African-American voters (the "Rice Plaintiffs"), filed suit in the United States District Court for the Middle District of Alabama. They contended that the Reed-Buskey plan was unconstitutional in that it failed to meet one-person-one-vote standards and diluted their votes, and that the State Senate and House of Representatives districts in which they lived were the products of unconstitutional racial gerrymandering. The Rice Plaintiffs, who live in Lee County, Alabama, named Hal Smith, in his official capacity as Probate Judge of Lee County, James Bennett, in his official capacity as Secretary of State of Alabama, and the State of Alabama as defendants (the "State Defendants"). They also named Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon, and Andrew Hayden, individually and on behalf of African-American voters (the "Sinkfield Defendants"), as defendants. Thus, the defendants in the federal court action included all of the parties to *Sinkfield v. Camp*.

The Rice Plaintiffs sought injunctive relief, including adoption of a new districting plan in time for the 1998 Legislative elections. Elections under the Reed-Buskey plan had been conducted without objection in 1994, and the next scheduled Legislative elections were in November 1998.

In their Answer, the State Defendants contended, *inter alia*, that the court should defer to the Alabama Legislature for a remedy, and that the Rice Plaintiffs' claims were barred by laches.

2. The Rice Plaintiffs Go To State Court.

Pursuant to 28 U.S.C. § 2284 (1994), a three-judge federal district court was convened. On August 14, 1997, the District Court directed the Rice Plaintiffs to move to intervene in the state court redistricting case that produced the Reed-Buskey plan, now styled *Sinkfield v. Bennett*, within 15 days. The Rice Plaintiffs intervened as directed. As set forth in greater detail below, other plaintiffs sought to join the federal court lawsuit, but chose not to follow the Rice Plaintiffs to state court. On September 4, 1997, the Circuit Court of Montgomery County granted the Rice Plaintiffs' motion to intervene.

On September 23, 1997, the District Court ruled that it would "stay its hand for a reasonable time to allow a determination to be made by the state court as to the constitutionality of the reapportionment plan contained in the 1993 consent decree, in light of later Supreme Court decisions [*i.e.*, the *Shaw* line of cases]." The District Court further scheduled a hearing for November 26, 1997, stating that it would proceed on the merits if "the constitutionality of the 1993 consent decree has not been resolved by the state court at that time."

The Circuit Court of Montgomery County conducted a trial on the Rice Plaintiffs' claims in November 1997. It had set a deadline for the intervention of other plaintiffs, but none sought to intervene. On November 20, 1997, the Circuit Court of Montgomery County ruled against the Rice Plaintiffs on each of their claims. App. at 156a-179a. The Rice Plaintiffs then gave notice of appeal to the Alabama Supreme Court.

In a December 18, 1998 decision, the Alabama Supreme Court dismissed the Rice Plaintiffs' appeal as moot. It reasoned that their "request for modification of

the 1993 consent judgment – which is based on the 1990 federal census – . . . would not affect future legislative elections." App. at 198a. In concluding that the appeal was moot, the court endorsed the contention of the State Defendants and rejected the Rice Plaintiffs' argument to the contrary. *See* App. at 344a – 345a; 358a-360a. The Alabama Supreme Court explained, "[W]e must conclude that the elections held in 2002 and subsequent years will be governed not by the current consent judgment, but by a new districting plan that is based on the 2000 census." App. at 198-99a. The court added that none of the exceptions to mootness recognized by this Court were applicable. *Id.* at n.1. While it dismissed the Rice Plaintiffs' appeal as moot, the Alabama Supreme Court did not direct vacatur of the trial court's judgment. The Rice Plaintiffs did not petition this Court for a writ of certiorari to review the Alabama Supreme Court's decision.

3. Federal Court Proceedings Resume.

On August 29, 1997, through the "First Amendment to Verified Complaint," eight new plaintiffs sought to assert *Shaw* claims as well as one-person-one-vote and vote dilution claims in the pending federal lawsuit. *See* App. at 145a-51a. These plaintiffs (Andrew Thompson, Peggy C. Kelley, Gonzalo F. Montiel, Ann G. Hunter, Daniel P. Brown, W. Ricardo Montiel, M.D., Karen D. Outlaw, and Kelly Brasher) were joined by Bibb Gunter, who filed a "Second Amendment to Verified Complaint" on September 12, 1997. *See* App. at 152a-55a. All of them, including Gunter, were referred to as the "Thompson Plaintiffs" until Thompson's claims were resolved against him on dispositive motions before trial. The plaintiffs have since been referred to as the "Kelley Plaintiffs." As noted above, none of the Kelley Plaintiffs sought to intervene in the state court proceeding. Instead, the District Court stayed consideration of their claims until those state-court proceedings, including appeal, were resolved.

On July 2, 1999, after lifting the stay, the District Court entered an order dismissing the Kelley Plaintiffs' one-person-one-vote and vote dilution claims on the ground that the state court judgment against the Rice Plaintiffs resolved those claims. In addition, the District Court held that Plaintiff Andrew Thompson's *Shaw* claim against SD 28 was barred by *res judicata*. Finally, the District Court ruled that the case would proceed as to all other claims and unaddressed defenses. *See* App. at 201a-218a.

That ruling left the *Shaw* claims of the following Kelley Plaintiffs unresolved: Andrew Thompson (HD 82), Peggy Kelley (HD 88 and SD 30), Gonzalo Montiel (HD 101 and SD 34), Ann Hunter (HD 75 and SD 25), Daniel P. Brown (HD 73 and SD 25), Ricardo Montiel (HD 63 and SD 21), Karen Outlaw (HD 89 and SD 30), Kelly Brasher (HD 41 and SD 14), and Bibb Gunter (HD 86 and SD 29). Shortly before trial, the District Court granted motions for summary judgment directed at Thompson's HD 82 claim, Kelley's HD 88 claim, and Brown's HD 73 claim. The District Court had previously allowed Brasher to dismiss her claims with prejudice and allowed Spinks to substitute for Hunter because Hunter no longer wanted to proceed. Finally, the District Court denied as untimely Gonzalo Montiel's motion to amend his complaint to allege residency in the correct House district and granted motions for summary judgment directed at his HD 101 claim.

As a result of these rulings, seven Kelley Plaintiffs (Daniel P. Brown, W. Ricardo Montiel, Karen D. Outlaw, Bibb Gunter, Peggy Kelley, Genae Spinks, and Gonzalo Montiel) brought *Shaw* claims relating to five Senate districts (SD 21, 25, 29, 30, and 34) and four House districts (HD 63, 75, 86, and 89) to trial. The District Court heard testimony and argument for six days in January 2000.

On April 24, 2000, the three-judge District Court held that four Senate districts (SD 21, 25, 29, and 30) and three House districts (HD 63, 75, and 86) were the products of unconstitutional racial gerrymandering. The District Court ruled against Plaintiff Gonzalo Montiel as to SD 34 and Plaintiff Karen Outlaw as to HD 89. The District Court

declined to order that the unconstitutional districts be redrawn and placed on the ballot in November 2000, but did enjoin the State from conducting any further elections in those seven districts. In entering its Judgment and Injunction, the District Court rejected the State Defendants' contentions that the Kelley Plaintiffs lacked standing, their claims were barred by laches, their claims were moot, and injunctive relief was not appropriate, as well as defenses on the merits.

One judge dissented. He concluded that the Kelley Plaintiffs lacked standing and contended that the majority had erred in rendering a decision that resulted in no substantive relief. He explained, "Whether the issue is viewed as one of mootness . . . or issue preclusion . . . [,] the current redistricting plan is too near the end of its life to afford any effective substantive relief." App. at 71a-72a (Thompson, J., dissenting) (footnote omitted).

On May 23, 2000, the State Defendants and the Sinkfield Defendants gave notice of appeal to this Court. *See* App. at 91a, 94a, respectively.

B. Statement of Facts.

Alabama adopted its current legislative plan, the Reed-Buskey Plan, in 1993. The last regularly scheduled elections under this plan were held in 1998. The Reed-Buskey Plan inherited certain critical features from the previous legislative plan. These include the number of Senate districts (35) and House districts (105) and the practice of "nesting" or grouping three House districts inside each Senate district. For example, the geographic area within Senate district 21 (SD 21) is congruent with the combined geographic areas of House districts 61, 62, and 63 (HD 61, *etc.*), which are nested within it.

When the Rice Plaintiffs filed suit on May 2, 1997, the Alabama Legislature's 1997 regular session was nearly over. By law, the Legislature's 1997 regular session began on the second Tuesday in February, and it was limited to 30 legislative days and 105 calendar days. *See* Ala. Code

§ 29-1-4 (1998) and Amendment notes. On May 2, 1997, the Legislature had consumed 26 of its 30 legislative days and could not have run longer than May 19, 1997, in any event. At that time, the Legislature was consumed with the particularly difficult issues of a state parks bond, tort reform, and budgets for the next fiscal year.

The relevant characteristics of the legislative districts at issue in this appeal and their related plaintiffs include the following.

SD 21/HD 63 – Ricardo Montiel

Montiel moved to the city of Tuscaloosa and SD 21/HD 63, in July 1997; before that he lived in another part of the State. SD 21 and HD 63 are within the acceptable range of ideal populations under the 1990 census, as are all other challenged districts. SD 21 is 81% white and 17% black,[3] and HD 63 is 83% white and 15% black.

Montiel claimed neither a stigmatic nor a representational injury. He had no knowledge of how the legislative districts he challenged were drawn. When he was asked for "any evidence that race was a consideration in the drawing of" several districts, including SD 21/HD 63, he candidly responded "No, and that's not even a concern of mine." App. at 372a. Montiel's "concern" was not race, but simply his general dissatisfaction with the shape of his Senate and House districts. He testified they had "an unusual look." *See* App. at 371a.

Montiel had never read the complaint filed in his name. App. at 372a. He did not testify at trial. Legislators and other witnesses testified at trial that the predominant reasons for the shapes of SD 21/HD 63 were not racial, and generally had to do with incumbent interests, the need to adequately populate districts, and preserving communities of interest.

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[3] The population figures reflect total population according to the 1990 Census.

SD 25/HD 75 – Genae Spinks

Genae Spinks lives in Montgomery County in SD 25/HD 75. SD 25 and the three House districts nested within it (HDs 73, 74, and 75) are majority white. SD 25 is 86% white and 12% black, and HD 75 is 78% white and 20% black. SD 25 includes parts of Montgomery and Elmore counties and shares Montgomery County with SD 26. SD 26 nests HDs 76, 77, and 78, and all of these districts are majority black. SD 26 lies completely within Montgomery County. According to the 1990 census, Montgomery County was some 16,000 persons short of being able to support two Senate districts.

In her deposition, Spinks said that she was able to elect the Senator and Representative of her choice, and that both of them did a good job. She described her complaints as dissatisfaction that her House district includes part of Elmore County and that the lines for SD 26 and its nested House districts were "gerrymandered to give an unfair advantage to blacks, frankly." Spinks did not testify at trial.

SD 29/HD 86 – Bibb Gunter

Bibb Gunter lives in the city of Dothan in Houston County, and in SD 29/HD 86. SD 29 is 74% white and 25% black. It contains HDs 85, 86, and 87, and all or parts of four counties. SD 29 adjoins SD 28. SD 28 is 38% white and 58% black.

HD 86 lies entirely within Houston County, and is bounded on two sides by the states of Florida and Georgia. HD 86's population is 84% white and 15% black.

Gunter believes that the shapes of SD 29 and HD 86 were "racially motivated to help the black," "to help the black, minority or whatever you want to call it, get their areas like they needed to be." He objects to the fact that the Reed-Buskey Plan was drawn "to include the majority of black votes in different segments of the districts and senate to help them [black people] – to help them to be able to put a black representative and have a stronger

voice." Consequently, he, as "a white person," was "living in a district that had been manipulated the way it was drawn to help the blacks," and this was "unfair" to him.

Gunter has not, however, been prejudiced by being placed in SD 29 and HD 86. He has been able to elect the Senate and House candidates of his choice, and he thinks they have "done a fairly good job." Moreover, he testified in deposition:

> Q. Can you tell me how you're injured by being placed in House 86? Have you been injured by being in House District 86?
>
> A. I don't think so. I don't think I've been injured.
>
> * * * *
>
> Q. Have you suffered any injury to any constitutional rights by being placed in Senate 29 that you know of?
>
> A. No, sir. If I have, I'm not aware of it. And as far as that goes, I don't know if anybody that has, black, white, or whatever.

SD 30 – Peggy Kelley

Kelley resides in SD 30, which comprises all or parts of seven counties. The district is 72% white and 27% black. Although SD 30 has a shape that invites inquiry, there was ample testimony at trial from state legislators and other witnesses to establish that the shape of SD 30 was dictated by the need to find enough people to bring the district within range of ideal population, to protect the incumbent, and to link communities of interest. Kelley did not testify at trial.

ARGUMENT

With the 2000 Census already underway and no further legislative elections scheduled until 2002, the District Court directed the State of Alabama not to conduct any more elections in seven legislative districts without the District Court's permission. The effect of this ruling is

evanescent because, with the receipt of Census data during March 2001, the Alabama Legislature is due to redraw the State's districting plan for both houses in a way that satisfies one-person-one-vote standards and this Court's *Shaw* jurisprudence. This fleeting "relief" was awarded in favor of six white residents of white-majority districts that adjoin black-majority districts, none of whom filed suit until 1997. Along the way, five other plaintiffs dropped out completely, including two whose *Shaw* claims were held to be moot by the Alabama Supreme Court.

This Court should summarily reverse the District Court's decision or, in the alternative, note probable jurisdiction for several reasons. First, the District Court's conclusion that the plaintiffs have standing conflicts with this Court's decision in *United States v. Hays*, 515 U.S. 737 (1995). As the dissent points out, the District Court majority fails to give effect to this Court's rejection of reliance on a neighboring district to establish standing. *See* App. at 66a-67a (quoting 515 U.S. at 746). Second, the District Court's rejection of the equitable defense of laches conflicts with the decisions of at least two other three-judge district courts. Third, the District Court's treatment of the mootness argument conflicts with this Court's *Rooker-Feldman* jurisprudence. For these and other prudential reasons, the District Court's injunction is improperly intrusive. Finally, the District Court's rulings on the merits are clearly erroneous.

I. The District Court Erred In Concluding That White Residents of White-Majority Districts Established Standing When They Pointed To Adjoining Black-Majority Districts And Otherwise Failed To Show A Personalized Injury.

This Court should summarily reverse the District Court's decision, or note probable jurisdiction, because the District Court's conclusion conflicts with this Court's decision in *United States v. Hays*, 515 U.S. 737 (1995). The District Court held that white residents of white majority

districts, who failed to show that they had suffered any stigmatic or representational injury, established standing merely by showing that they lived in districts that adjoin newly-created black majority districts. This conclusion is inconsistent with *Hays* and guts the requirements for standing that *Hays* established.

A. The *Hays* Test Requires That *Shaw* Plaintiffs Live In The District That Is The "Primary Focus" Of Their Claim.

In *Hays*, this Court held that the Hays appellees lacked standing because they

> do not live in the district that is the primary focus of their racial gerrymandering claim, and they have not otherwise demonstrated that they, personally, have been subjected to a racial classification.

Id. at 739. Observing that identifying the individualized injury that standing requires in the racial gerrymandering context "may not be easy," this Court explained:

> Where a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action. . . . On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference. Unless such evidence is present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve.

Id. at 744-45. This Court next pointed to the absence of specific evidence of the plaintiffs' having been subjected to a racial classification. Then, significantly, it rejected reliance on both individual challenges to the plan as a

whole, *i.e.*, global challenges, and on the configuration of a neighboring district to establish standing. Global challenges do not suffice to establish standing because they do not lead to a conclusion that a particular plaintiff was injured by a racial classification. *Id.* at 746. Neighboring districts do not establish standing either:

> [E]ven assuming, *arguendo*, that the evidence in this litigation is enough to state a *Shaw* claim with respect to District 4, that does not prove anything about the legislature's intentions with respect to District 5, nor does the record appear to reflect that the legislature intended District 5 to have any particular racial composition. Of course, it may be true that the racial composition of District 5 would have been different if the legislature had drawn District 4 in another way. But an allegation to that effect does not allege a cognizable injury under the Fourteenth Amendment. We have never held that racial composition of a particular voting district, without more, can violate the Constitution.

Id. at 746 (citations omitted).

In this case, the Kelley Plaintiffs, with one exception,[4] complained that the district in which they live would have looked different if the adjoining majority black district had been drawn differently. They characterized their use of the demographics and shape of the adjoining black-majority district as "evidence" that an unconstitutional racial intent affected the drawing of their districts. In *Hays*, this Court characterized such a showing as a generalized complaint

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[4] The exception is Bibb Gunter's complaint regarding Senate District 29. Gunter lives in that Senate district, but the primary focus of his challenge was HD 85, in which he does not reside. Even if Gunter had standing to challenge SD 29's configuration, his claims are due to be denied on the ground of laches, claim preclusion, or no practical relief.

about the racial composition of a voting district that, "without more," does not violate the Constitution. *See Hays*, 515 U.S. at 746.

Even so, the District Court concluded that all of the Kelley Plaintiffs had standing. The District Court concluded that a *Shaw* plaintiff satisfies *Hays* by showing "(1) that he lives in the district he challenges and (2) that the district is 'racially gerrymandered.' " App. at 5a. Applying this reading of *Hays*, the District Court concluded that each of the Kelley Plaintiffs who, in its view, proved a case of racial gerrymandering had standing. Conversely, the Kelley Plaintiffs who did not prove that they lived in racially gerrymandered districts had their claims dismissed for lack of standing.

The District Court's conclusion is factually and legally flawed. As the dissent points out, the majority's approach reads the "primary focus" limitation out of *Hays*. App. at 59a-60a (Thompson, J., dissenting). Doing so goes hand in hand with the majority's decision to ignore the fact that this Court rejected reliance on the demographics of neighboring districts to prove standing in *Hays*. *See* App. at 66a-67a (Thompson, J., dissenting) (quoting *Hays*, 515 U.S. at 746). Second, as the District Court acknowledged, its reading of *Hays* "admittedly conflates Article III jurisdiction with the merits. . . . " App. at 5a.

B. The District Court Misread *Hays* By Giving No Effect To The "Primary Focus" Inquiry.

The District Court erred in its treatment of what it termed "the vagueness of the infinitely manipulable term 'primary focus.' " App. at 3a. Put simply, the majority overlooked it, concluding that, because the Kelley Plaintiffs had alleged that they "challenge[d] the districts in which they vote," there was no need to inquire further. App. at 4a. In *Hays*, however, this Court concluded that the Hays appellees lacked standing, not because they failed to challenge the districts in which they voted, but, rather, because, in the first instance, they did not live in

the district that was the "primary focus" of their claim. 515 U.S. at 739 (emphasis added). Contrary to the District Court's view, this Court illustrated the meaning of "primary focus" in *Hays* when it held that a *Shaw* plaintiff does not establish standing by making a global challenge or by pointing to the demographics of neighboring districts. *Id.* at 746. That is what the Kelley Plaintiffs did, however, as the dissent explains. *See* App. at 66a-67a. By abandoning the "primary focus" inquiry, the District Court allowed the Kelley Plaintiffs to manipulate that "infinitely manipulable term."

Instead of complaining about the perceived lack of clarity in the "primary focus" test, the District Court should have looked to the entirety of the *Hays* opinion for guidance. In particular, the District Court should have given effect to this Court's instruction that proof of intent as to one district says nothing about the intent as to an adjoining district. As this Court noted, "[I]t may be true that the racial composition of District 5 would have been different if the legislature had drawn District 4 in another way. But an allegation to that effect does not allege a cognizable injury under the Fourteenth Amendment." *Hays*, 515 U.S. at 746.

The dissent correctly points out that the Kelley Plaintiffs had done no more than to show that the racial composition of their districts would be different if the neighboring districts had been drawn differently. *Hays* says that such a showing is not enough to establish standing because it does no more than "assert[ ] . . . a generalized grievance against governmental action" of which the Kelley Plaintiffs disapprove. *Id.* at 746. The dissent explains:

> In the case before us, as in *Hays*, this deeper inquiry into the evidence behind the plaintiffs' claims reveals that their primary focus is to attack the majority-black districts that neighbor their own, rather than to challenge only their districts or to vindicate their own right to equal protection of the laws. The plaintiffs have failed

> to produce even a shred of evidence demonstrating that the drafters of the current legislative districting plan formed an independent intent to place whites in their districts or consciously created white-majority districts to achieve personal or political ends. Nor have they provided any specific evidence suggesting that they personally were placed in their districts because of race. Rather, the plaintiffs' objection is to the deliberate creation of majority-black districts for the purpose of increasing black voting power in Alabama. The creation of these majority-black districts necessarily caused the neighboring districts to change shape, admittedly quite substantially at times, and resulting in rather irregular boundaries. Nevertheless, the only sense in which the plaintiffs object to the way their own districts were drawn is insofar as their districts represent the negative space out of which the objectionable majority-black districts were carved.

App. at 62a-63a (Thompson, J., dissenting).

That characterization is correct. Dr. Reed testified that, when he drew the Reed-Buskey plan, one of his goals was to increase African-American representation in the State Legislature. He operated in a zero-sum environment: Each new black-majority district meant one fewer white-majority district. Significantly, new or reconfigured black-majority districts adjoin the districts in which the Kelley plaintiffs live. As the dissent points out:

> Plaintiff Ricardo Montiel's objections to SD 21 focus on the portions of Tuscaloosa County included in neighboring majority-black SD 24 and therefore necessarily left out of his own district. His objections to the shape of HD 63 focus on the same portions of Tuscaloosa, which were placed in majority-black HD 70 rather than in his own district. Plaintiffs Daniel Brown and Genae Spinks, who reside in SD 25, object to their own district only to the extent that it was shaped by

> the race-conscious drawing of neighboring SD 26. Spinks's challenge to HD 75 primarily alleges that her district should have included areas that were instead placed in HD 76 for racial reasons. Plaintiffs Peggy Kelley and Karen Outlaw purport to object to SD 30, but the focus of their claim is the racially-motivated drawing of SD 23 in Lowndes County, and of SD 29 in Dale County. While nominally objecting to HD 89 and HD 86, plaintiffs Karen Outlaw and Bibb Gunter complain primarily of how the shape of their districts was dictated by the drawing of neighboring majority-black HD 85.

App. at 63a-64a (Thompson, J., dissenting); *see also* App. at 41a (Majority opinion) ("Being on HD 85's periphery puts HDs 89 and 86 within the zone of effects of HD 85.")

The District Court's erroneous treatment of *Hays* allowed plaintiffs who live in white-majority districts to attack the neighboring black-majority districts. That reading threatens widespread litigation that merely bows in the general direction of standing after the next round of redistricting. This Court should reverse the District Court's decision and reinforce the rule of *Hays*.

C. The District Court Erred In Equating Jurisdiction With The Merits.

The District Court's "confla[tion]" of standing with the merits produces an absurd result. It means that only two outcomes are possible in a *Shaw* case: the plaintiff prevails on the merits, or the plaintiff who does not prevail on the merits has his claims dismissed for lack of standing. *Cf.* App. at 5a ("Th[e] second prong of the *Hays* test . . . will have to wait until we finish discussing the merits. . . . "); App. at 54a (conclusion includes dismissal of claims challenging HD 89 and SD 34 "as well as all districts for which summary judgment was granted, for want of jurisdiction.") In either event, the State is obligated to defend on the merits. The majority acknowledges that its approach is unusual, producing "a situation not

often encountered," but asserts that this is what *Hays* "strongly implies." App. at 5a. What *Hays* is said to imply, however, is belied by what it says: "[T]he judgment of the District Court is vacated, and the cases are remanded with instructions to dismiss the complaint." 515 U.S. at 747. This Court did not need to review the merits of the *Hays* Respondents' claims in order to conclude that they had no standing, and neither did the District Court in this case.

More generally, the District Court's approach runs afoul of this Court's rejection of the concept of "hypothetical jurisdiction" in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-02 (1998). There, this Court characterized standing as a "threshold jurisdictional question," noting, "Standing to sue is part of the common understanding of what it takes to make a justiciable case." *Id.* at 102. Addressing the practice of "hypothetical jurisdiction," which lower federal courts had used to proceed to the merits without addressing jurisdictional issues, this Court "decline[d] to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.* at 94.

The District Court's conflation of standing and merits in this case, and its implicit endorsement of that approach in *Shaw* cases generally, gives rise to two kinds of structural concerns: separation of powers concerns and federalism concerns. The absence of standing is a jurisdictional defect, and courts that pronounce on the constitutionality of state laws or actions when there is no jurisdiction act ultra vires. *See Steel Co.; see also Ruhrgas A. G. v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("Subject-matter limitations on federal jurisdiction . . . keep the federal courts within the bounds that the Constitution and Congress have prescribed.") Here, plaintiffs who failed in their attempt to show that the State had acted unconstitutionally in drawing one or both of their districts were held to have lacked standing only after a trial on the merits.

The District Court's willingness to adjudicate the merits of State action before deciding standing also entails

federalism costs. In *Growe v. Emison*, 507 U.S. 25 (1993), this Court reiterated its "recognition" that reapportionment is primarily a duty of the States not the federal courts. *Id.* at 34. Just as this Court instructed the federal courts to yield to ongoing state proceedings in redistricting cases in *Growe*, in order to avoid trampling on state prerogatives, the federal courts should make sure of their jurisdiction before judging the constitutionality of state districting efforts. The District Court's conflation approach promises only future intrusion.

In this case, the standing question should not have been so difficult for the court. The State Defendants took the deposition of each Plaintiff and put standing before the District Court through dispositive motions. This effort was, inexplicably, to no effect. For example, Plaintiff Peggy Kelley testified that she was satisfied with HD 88, the House district in which she lived. App. at 362a. The District Court granted the State Defendants' motion for summary judgment as to that claim but did not address Kelley's testimony disclaiming any controversy. *See* App. at 219a-225a. Similarly, Plaintiff, Ricardo Montiel, who moved to Tuscaloosa after the plan had been used in the 1994 election, thought his House and Senate districts have "an unusual look," but testified that race was not "a concern of mine." App. at 371a-372a. The District Court denied the State Defendants' motion for summary judgment as to Ricardo Montiel's claims without explanation. The other Kelley Plaintiffs gave no indication of having suffered a representational or stigmatic injury.

II. The District Court Erred In Refusing To Apply Laches As A Bar To The Plaintiffs' Claims.

Under "the doctrine of laches, . . . equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would prejudice a defendant." *Russell v. Todd*, 309 U.S. 280, 287 (1940). In the redistricting context, the disinclination to consider claims made late in a decennium serves state interests in "the need for stability and continuity in the

organization of the legislative system. . . . " *Reynolds v. Sims*, 377 U.S. 533, 583 (1964). Accordingly, "courts are reluctant to redistrict shortly before a new census, which might require yet another reapportionment." *Wesch v. Folsom*, 6 F.3d 1465, 1472 (11th Cir. 1993), *cert. denied*, 510 U.S. 1046 (1994).

The District Court's decision not to apply laches conflicts with two recent decisions by three-judge courts and with a decision of the Fourth Circuit. Three-judge district courts sitting in Florida and Louisiana applied laches to bar claims that would have resulted in the redrawing of district lines for the 2000 elections. *See Fouts v. Harris*, 88 F. Supp. 2d 1351 (S.D. Fla. 1999) (three-judge court), *affirmed sub nom. Chandler v. Fouts*, 120 S. Ct. 1716 (2000);[5] *Maxwell v. Foster*, Civil Action No. 98-1378 (W.D. La. Nov. 24, 1999) (three-judge court).[6] Both of these decisions, which were rendered in late 1999, were brought to the attention of the District Court, but were not addressed, distinguished, or even cited. These decisions relied on the Fourth Circuit's decision in *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991). *See also Maryland Citizens for a Representative Gen'l Assembly v. Governor of Maryland*, 429 F.2d 606, 610 (4th Cir. 1970).

Those courts have noted the disruptive effect of redistricting lawsuits brought late in the decade. As the Fourth Circuit explained:

> If we affirm the district court's order, the Board will be required to reapportion itself this year and it will probably be required to do so again next year, when the results of the 1990 Census are available. We believe that two reapportionments within a short period of two years would

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[5] This Court's summary affirmance is a rejection of the challenges presented in the jurisdictional statement. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

[6] A copy of the Order Granting Defendants' Motion for Summary Judgment in *Maxwell* has been lodged with the Clerk of the Court.

> greatly prejudice the County and its citizens by creating instability and dislocation in the electoral system and by imposing great financial and logistical burdens. Such a disruption is not justified when there will be no election prior to November 1991, at which time the court-ordered plan may no longer be appropriate because of new census information.

White v. Daniel, 909 F.2d at 104. Laches does not constitute a "permanent barrier" to claims, it simply defers judicial consideration of them until a time when relief can effectively be ordered. *Maxwell, supra*, at 9.

The same considerations apply in this case. None of the Kelley Plaintiffs sought to intervene in the federal lawsuit before August 29, 1997, after the 1997 regular session of the Alabama Legislature had ended. They then declined the opportunity to intervene in a state court action that they knew would have resulted in a 1997 trial. Instead, their case did not come to trial until January 2000. The District Court should have looked at the calendar and asked itself why it was trying a redistricting case in January of a census year.

Put simply, the Kelley Plaintiffs delayed in filing their case, failed to explain their delay, and the delay prejudiced the State. That showing satisfies the elements of laches. *See, e.g., Costello v. United* States, 365 U.S. 265, 282 (1961) ("Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."). The District Court's finding to the contrary is legally incorrect for two reasons. First, the District Court's conclusion that the Kelley Plaintiffs' delay was not unreasonable misses the point. *Miller v. Johnson*, 515 U.S. 900 (1995), told the Kelley Plaintiffs what they needed to show to prevail, but they dawdled, inexplicably, for two more years before commencing their action. If they had filed sooner, the State would not have been prejudiced. Second, the District Court's dismissal of the State's prejudice showing, which the court accomplished by denying the Kelley Plaintiffs the most intrusive

relief they sought, ignores the intrusiveness of the relief granted. *See, infra,* at 28.

Racial gerrymandering claims arise out of a process that a State undertakes anew every ten years. Once a State has redistricted, it is entitled to expect a period of stability. This Court said as much in *Reynolds v. Sims*. *See* 377 U.S. at 583-84. Voters who believe themselves to be victims of racial gerrymandering, vote dilution, or a violation of § 2 of the Voting Rights Act should attack the plan or their districts, as appropriate, promptly. The sooner they do so, the more reliable the preceding Census data will be and the greater the likelihood that a feasible remedy can be devised.

III. The District Court Erred In Rejecting The Alabama Supreme Court's Conclusion, Reached After Briefing By The Parties, That *Shaw* Claims Like Those Made By The Plaintiffs Are Moot.

In *Rice v. Sinkfield*, 732 So. 2d 993 (Ala. 1998), the Alabama Supreme Court held that all of the Rice Plaintiffs' claims, including their *Shaw* claims, were moot and dismissed their appeal from the Montgomery County Circuit Court's judgment against them. The District Court gave only limited preclusive effect to the Alabama Supreme Court's decision, declining to apply its conclusion that the Rices' *Shaw* claims were moot to the Kelley Plaintiffs. The District Court's decision rests on factual errors and runs afoul of the *Rooker-Feldman* doctrine.

A. The District Court's Factual Errors Infect Its Mootness Analysis.

The District Court proceeds on the asserted basis that the Alabama Supreme Court raised the mootness issue *sua sponte*, applied it to a limited claim for relief, and applied Alabama law. Each of these factual assertions is incorrect.

First, the State raised the issue of mootness, not the court *sua sponte*. The first argument in the State's brief in the Alabama Supreme Court was titled: "The Trial Court's

Judgment Should Be Vacated and This Case Dismissed As Moot." *See* App. at 344a-345a. In response, the Rice Plaintiffs asserted that the Alabama Legislature might not have a new plan in place by 2002, giving rise to "the possibility that the 2002 legislative elections will need to be conducted based on the districts at the time – districts put into place by the Reed-Buskey Plan." *See* App. at 359a. In addition, the Rice Plaintiffs pointed to the possibility that the State might need to call a special election to fill a vacancy. App. at 359a-360a. Thus, the parties placed both mootness and the proposed vacancy exception before the Alabama Supreme Court.

Second, the relief sought was not limited; it was, rather, time-bound. When the Rice Plaintiffs filed their Complaint-In-Intervention in state court in August 1997, they sought, *inter alia*, a declaration that HD 79 and HD 83 were unconstitutional, a declaration that the Partial Consent Decree that adopted the Reed-Buskey Plan was illegal and unenforceable, judicial redrawing of the district lines, and other preliminary and permanent injunctive relief. Subsequently, in their post-trial brief, which was filed in November 1997, the Rice Plaintiffs sought a preliminary injunction to prevent any further use of those districts until constitutional alternatives could be implemented. As late as November 1997, all of the Plaintiffs expected that, if they prevailed, new lines would be in place for the 1998 legislative elections. When the Rice Plaintiffs saw that the Alabama Supreme Court proceedings would carry into the middle of 1998, they started talking about 2002. *See* App. at 359a.

Third, the Alabama Supreme Court applied "the federal doctrine of mootness," not Alabama law. It stated:

> The Supreme Court of the United States has recognized several exceptions to *the federal doctrine of mootness* that are applicable to cases involving: (1) class actions where some members of the class still have a live case or controversy; (2) wrongs capable of repetition, yet evading review;

> (3) continuing collateral consequences to a party; and (4) voluntary cessation of injurious activity by a party who is free to resume it. . . . *The rationales underlying these exceptions are not applicable to this case.*

See App. at 199a-200a n.1 (emphases added) (internal citations and parentheticals omitted). The court's rejection of the "capable of repetition yet evading review" exception is responsive to the Rice Plaintiffs' arguments about no new plan and the possibility of vacancy. The cases cited are federal or universal in their discussion of mootness. Thus, the District Court's assertion that the Alabama Supreme Court applied Alabama law is incorrect.

These factual errors show that the District Court's conclusion is flawed. The Alabama Supreme Court rejected the same exceptions to mootness that the District Court point to. Thus, the District Court was, in fact, second-guessing the Alabama Supreme Court. This, it cannot do.

B. The *Rooker-Feldman* Doctrine Bars The District Court From Revisiting The Alabama Supreme Court's Decision.

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), this Court held that the federal courts lack jurisdiction to review the civil decisions of state courts for constitutional error. Such decisions can be reversed or modified only by this Court. As this Court explained, "To [reverse or modify a state court judgment] would be an exercise of appellate jurisdiction. The jurisdiction possessed by the district courts is strictly original." *Id.* at 416. Subsequently, in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), this Court held that the federal district courts lack jurisdiction to hear complaints that are "inextricably intertwined" with state court judgments. *Id.* at 486-87. As the Eleventh Circuit has noted, "The *Rooker-Feldman* doctrine applies as long as the party had a reasonable opportunity

to raise his federal claims in the state court proceeding." *Dale v. Moore*, 121 F.3d 624, 626 (11th Cir. 1997).

In this case, the District Court's application of *res judicata* principles at the preliminary summary judgment stage should have set the ground-work for the application of the *Rooker-Feldman* doctrine. The District Court held that the state-court judgment against the Rices barred the Kelley Plaintiffs' claims of one-person-one-vote and vote dilution violations.[7] The District Court further concluded that the Kelley Plaintiffs could not be "characterized as strangers to the state-court action and are more properly characterized as alter-egos of the Rice Plaintiffs." App. at 211a. Moreover, the District Court held that it would not offend due process to bind the Kelley Plaintiffs to the state-court litigation, noting

> The state court invited the [Kelley] plaintiffs to participate in the prior suit, and this court twice suggested that they do the same. The [Kelley] plaintiffs thus had notice of the state litigation and had ample opportunity to be heard. The Rice plaintiffs, moreover, expressly sought to represent a class that clearly includes the [Kelley] plaintiffs, and there is every reason to conclude that the state court took care to protect the interests of non-party class members. The [Kelley] plaintiffs were fully aware of these class claims and yet did nothing.

App. at 212a-213a.

Having thus equated the Rice Plaintiffs to the Kelley Plaintiffs with respect to global claims, the District Court should have equated them with respect to the global defense of mootness. The District Court declined to apply the Alabama Supreme Court's holding of mootness to the

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[7] It also held that Plaintiff Andrew Thompson's *Shaw* claim against SD 28 was precluded. Subsequently, however, the District Court declined to hold that the Circuit Court's adjudication of SD 28 was preclusive of claims made from the opposite side of the boundary with respect to portions of SD 29.

Kelley Plaintiffs because, in its view, mootness was not "a single, certain and material point arising out of the allegations and *contentions of the parties.*" *See* App. at 10a, (quoting *Christian Television Corp. v. RCH Broadcasting, Inc.*, 554 So. 2d 989, 992 (Ala. 1989)) (emphasis added by District Court) (internal quotations omitted). As previously noted, the District Court's conclusion that the Alabama Supreme Court raised mootness *sua sponte* is incorrect. Moreover, the Kelley Plaintiffs wanted the same relief that the Rice Plaintiffs wanted, an interim election with redrawn districts.

The District Court should have equated the Kelley Plaintiffs with the Rice Plaintiffs for another reason: The same attorney orchestrated all the claims. The Kelley Plaintiffs included that attorney's father, his brother, his wife's grandmother, his former partner's father, the mother of a court reporter he frequently employed, and former clients. They all attacked the same plan from different directions, and all wanted the same global results. The 1998 election was the last one under the current plan for every one of the Kelley Plaintiffs. Their *Shaw* claims were just as moot as those of the Rice Plaintiffs.

IV. The District Court Erred In Adjudicating The Merits Of A *Shaw* Redistricting Case Where No Relief Within The Confines Of Alabama's System Of Government Was Workable.

This Court should summarily reverse the District Court's decision or note probable jurisdiction because the District Court adjudicated liability in the absence of an available remedy. The District Court's action conflicts with this Court's decisions in *Holder v. Hall*, 512 U.S. 874 (1994), and *Thornburg v. Gingles*, 478 U.S. 30 (1986). In addition, the District Court's ruling is so fundamentally advisory in nature that it runs afoul of the "case or controversy" requirement that is the linchpin of federal-court jurisdiction.

In *Holder*, this Court held that the size of a governmental body does not provide the basis for a challenge under § 2 of the Voting Rights Act. Justice Kennedy, writing for himself, the Chief Justice and Justice O'Connor, stated:

> [W]here there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2.

Id. at 881. Justice Kennedy explained that "[t]here is no principled reason why one size should be picked over another as the benchmark for comparison." *Id.* Similarly, in *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court observed that the failure to prove certain of the elements would show that a multi-member district structure was not the cause of the inability of minority voters to elect their preferred candidates. *Id.* at 50-51.

The Eleventh Circuit has drawn on *Holder* and *Gingles* in holding that the absence of a remedy precludes liability. *See Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1083 (1995). The Eleventh Circuit stated:

> *Holder* . . . confirms that, from the inception of a section 2 case, the existence of a workable remedy within the confines of the state's system of government is critical to the success of a vote dilution claim. The absence of an available remedy is not only relevant at the remedial stage of the litigation but also precludes, under the totality of the circumstances inquiry, a finding of liability.

Id. at 1533 (citing *Gingles*, 478 U.S. at 51); *see also Nipper* at 1533 ("[T]he possibility of an acceptable remedy is essential to a successful section 2 vote dilution claim. . . . ")

In this case, the District Court did not find a remedy that is workable within the confines of Alabama's system of government. Instead, it intervened when intervention was unnecessary and imposed relief that is both unlikely

to be required and intrusive. Relief is unnecessary at this time because the State is due to redraw the entire plan in 2002, and changes to the current plan will certainly be made. For example, Representative Greg Wren, the incumbent in HD 75 testified that the population of his district has increased dramatically in the last decade. Without conceding that HD 75 as presently configured is unconstitutional, it is unlikely to be replicated in 2002. The explosive population growth in HD 75 shows that the 1990 Census, which would be the baseline for any court-ordered redrawing of districts, is too stale to use. In short, any problem with the Reed-Buskey plan is due to be fixed in the ordinary course of events, without court intervention.

The District Court's intervention is intrusive for several reasons. The District Court declared that no further elections are to be conducted in seven districts as currently configured but did not commit to ordering a special election in the event of a vacancy. *See* App. at 51a-52a. The likelihood that a special election will be needed to fill a vacancy in one or more of these seven districts before 2002 is minimal and diminishes every day. To conduct such a special election, the Legislature would likely have to: (1) meet in an expensive special session; and (2) use stale Census data for its work. It will then redraw one piece of a puzzle that will be completely redesigned in 2002. That special handiwork would not be usable after 2002 because it would have been redrawn with stale data. If the District Court ultimately tells the State to do all of this unnecessary work, it will be interfering with a function that is left to the State in the first instance.

In sum, the District Court imposed "no substantive relief at all." App. at 70a. (Thompson, J., dissenting) The State was going to correct any problems with this plan on its own, and, if it did not, a new court could consider the question in the context of new census data. It is unlikely that the District Court will have to order special elections. Thus,

> When all is said and done, the reality here is that all the plaintiffs will get from this court and from this litigation is their attorneys' fees and expenses from the defendants.

App. at 75a (Thompson, J., dissenting).[8]

V. The District Court Erred In Concluding That Alabama State Senate Districts 21, 25, 29, And 30, And Alabama House Of Representatives Districts 63, 75, And 86, Were The Products Of Unconstitutional Racial Gerrymandering.

The District Court's conclusion that these districts are unconstitutionally racially gerrymandered is clearly erroneous. Space limitations prevent a detailed discussion of all districts, but the State sets forth several reasons why the conclusion as to HD 86 is incorrect as an example of the District Court's errors.

1. First, the District Court erred in dismissing the State's evidence of compactness. *See* App. at 47a-49a. According to the standards that this Court has endorsed, HD 86 is compact. *See Bush v. Vera*, 517 U.S. 952, 960 (1996). Its dispersion compactness score is 0.511, and its perimeter compactness score is 0.397.

2. The District Court erred in tainting HD 86 with its proximity to HD 85. *See* App. at 41a ("Being on HD 85's periphery puts HDs 89 and 86 within the zone of effects of HD 85."). The State agrees that HD 85 was new under the Reed-Buskey plan, and was majority black in total population and plurality white in voting age population according to the 1990 Census. But a conclusion regarding the

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[8] The Kelley Plaintiffs have requested that the District Court award them $583,298.42 in attorneys' fees and $46,708.97 in costs. The State does not concede that, even if the Kelley Plaintiffs are correctly held to be prevailing parties within the meaning of *Farrar v. Hobby*, 506 U.S. 103 (1992), they are entitled to the amounts claimed.

intent behind HD 85 says nothing about the intent behind HD 86. *See Hays*, 515 U.S. at 746.

3. The District Court's reliance on the placement of the northeast quarter of Dothan in HD 85 misses the point. The City of Dothan is the largest city in HD 86 and in Houston County, and, according to the 1990 Census, its northeast quarter is majority black. That quarter was placed in HD 85, but it has been split from the rest of Dothan since the 1983 plan. Thus, the Reed-Buskey plan preserved that preexisting division of Dothan and the voter expectations that went with it. Put another way, HD 86 would have to "annex" the northeast corner of Dothan to bring it within its lines, and the Eleventh Circuit has held that annexation is not a proper remedy for vote dilution claims. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1200 (11th Cir. 1999).

CONCLUSION

For the foregoing reasons, this Court should summarily reverse the District Court's decision or note probable jurisdiction.

Respectfully submitted,

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Nos. 00-132 and 00-133

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In The

Supreme Court of the United States

JAMES BENNETT, in his official capacity as Secretary of State of Alabama, et al.,

Appellants,

v.

PEGGY KELLEY, et al.,

Appellees,

and

DARRYL SINKFIELD, et al.,

Appellants,

v.

PEGGY KELLEY, et al.,

Appellees.

On Appeals From The United States District Court For The Middle District Of Alabama

APPENDIX TO JURISDICTIONAL STATEMENTS
Volume I, Pages 1a to 179a

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

PEGGY C. KELLEY, GONZALO F. MONTIEL, DANIEL P. BROWN, W. RICARDO MONTIEL, M.D., KAREN D. OUTLAW, BIBB GUNTER, and GENAE SPINKS,

Plaintiffs,

v.

JAMES BENNETT, in his official capacity as Secretary of State of Alabama, and THE STATE OF ALABAMA,

Defendants,

and

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, and ANDREW HAYDEN,

Defendants.

CIVIL ACTION NO. 97-A-715-E

MEMORANDUM OPINION

(Filed April 24, 2000)

BEFORE COX, Circuit Judge, ALBRITTON, Chief District Judge, and THOMPSON, District Judge.

COX, Circuit Judge, with whom ALBRITTON, Chief District Judge, joins.

I. Introduction

The plaintiffs, all Alabama voters, have challenged their state house-of-representative and senate districts under the equal-protection principles announced in *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993). This court's earlier published opinions have adequately recited this action's history.[1] In unpublished orders, we have granted summary judgment in the defendants' favor on five of those districts on various grounds: house districts (HDs) 73, 82, 88, and 101, and senate district (SD) 28. We held a trial on the remaining claims, which challenge SDs 21, 25, 29, 30, and 34 and HDs 63, 75, 86, and 89, and now enter the following findings of fact and conclusions of law.[2]

We conclude that race predominated in the drawing of seven of the nine districts under challenge: SDs 21, 25, 29 and 30, and HDs 63, 75, and 86; that those districts do not survive strict scrutiny; and that they are thus unconstitutional. Before we reach those conclusions, however, we address the global, procedural defenses that the defendants have interposed.

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[1] *See Rice v. Smith*, 988 F.Supp. 1437 (M.D. Ala. 1997); *Thompson v. Smith*, 52 F. Supp. 2d 1364 (M.D. Ala. 1999). (The names in the captions have changed as a result of previous rulings.)

[2] At trial, the parties stipulated to the dismissal of Hal Smith, in his official capacity as Probate Judge of Lee County, Alabama, as a defendant, leaving James Bennett, in his official capacity as Secretary of State of Alabama, and the State of Alabama, as the only state defendants.

II. Procedural Defenses

A. Standing

The defendants first argue, as they did in support of their summary judgment motions, that the plaintiffs lack standing. The reason, according to the defendants, is that the plaintiffs' real goal is to eliminate the majority-minority districts in Alabama, and that the "primary focus" of their case is therefore not on the districts they inhabit (all of which are majority white), but the adjacent majority-black districts. Thus, in applying the analysis of *United States v. Hays*,[3] which controls on the issue of standing, the court must first determine which districts the plaintiffs are really challenging.

The Court in *Hays* was confronted as we are with the issue of what district the plaintiffs were challenging. The *Hays* plaintiffs challenged the entire legislative act that created Louisiana's congressional districts. *See Hays*, 515 U.S. at 746, 115 S. Ct. at 2437. Applying any district-limited concept of standing required the Court, therefore, to infer from other indicia in the case – the evidence presented at trial, for instance, and the district court's fact-findings – what district at bottom was actually under challenge. *See id.* at 745, 115 S. Ct. at 2436. The plaintiffs here, by contrast, had the benefit of *Hays's* district-limited standing rule and were able to particularize their claims by district. We can therefore thank them, and the drafters of the Federal Rules of Civil Procedure, for saving us from floundering in the vagueness of the infinitely manipulable term "primary focus." Instead, we can look

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[3] 515 U.S. 737, 115 S.Ct. 2431 (1995).

to the complaint. That is where the Rules say claims reside if, as here, there is no superseding pretrial order. *See* Fed. R. Civ. P. 8(a); Fed. R. Civ. P. 16(e). And there, plain as day, the plaintiffs challenge the districts in which they vote.[4] They do not challenge the majority-black districts next door, as the defendants contend. They would perhaps have stronger claims if they did challenge the next-door districts, but that does not mean they must be deemed to challenge those rather than the ones they say they challenge.

That decided, we can turn to the question of whether they have standing to attack their districts of residence under *Hays's* interpretation of the Case or Controversy Clause. Many trees have perished in the academic pursuit of an understanding of *Hays's* theories of constitutional harm. *See, e.g.*, Judith Reed, *Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court's View of the Right to Vote*, 4 Mich. J. Race & L. 389 (1999); Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 Harv. L. Rev. 2276 (1998); Melvyn R. Durchslag, United States v. Hays: *An Essay on Standing to Challenge Majority-Minority Districts*, 65 U. Cin. L. Rev. 341 (1997); John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 Harv. L. Rev. 576 (1997); Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 Cumb. L. Rev. 287 (1995-96). This academic wisdom suggests that applying *Hays's* theory of standing in a principled way to

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[4] Except for Dr. Gonzalo Montiel, who mistakenly challenged the house district next door; this claim is no longer before us.

our case, which is apparently unique among the Shaw cases in that we have white plaintiffs challenging majority-white districts that are next door to engineered minority "safe seats," may be difficult.

But we are charged with applying the law as it is. Consequently, we read *Hays* in its simplest terms, arbitrary as that may seem to academia: a *Shaw* plaintiff can satisfy the first element of Article III standing, injury-in-fact,[5] by showing (1) that he lives in the district he challenges and (2) that the district is "racially gerrymandered." This is indeed how simply the Supreme Court has applied *Hays* in later cases. *See Bush v. Vera*, 517 U.S. 952, 957-58, 116 S. Ct. 1941, 1951 (1996); *Shaw v. Hunt*, 517 U.S. 899, 904, 116 S. Ct. 1894, 1900 (1996). The second prong, as we read *Hays*, admittedly conflates Article III jurisdiction with the merits, a situation not often encountered. But that is what *Hays* strongly implies when it speaks of the necessity that the plaintiff reside in a "gerrymandered district." *Hays*, 515 U.S. at 745, 115 S. Ct. at 2436. The upshot here is that we must dismiss for want of jurisdiction all claims in which the plaintiffs have failed to prove that the district is "racially gerrymandered." That second prong of the *Hays* test, moreover, will have to wait until we finish discussing the merits, below. At the outset, we note simply that all the plaintiffs undisputedly inhabit their challenged district or districts, and that they are therefore halfway there on their standing showing.

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[5] No other element of standing is disputed here; nor do we see any reason to question them.

The Sinkfield defendants' counsel concurred in this statement of *Hays's* rule at the oral argument held at the trial's conclusion. The Sinkfield defendants and State defendants argue now, however, that the plaintiffs' subjectively felt harms are those that are relevant to a determination of injury-in-fact. They point to the two constitutional harms that *Hays* identified – representational (poor representation because representatives of racially gerrymandered districts will see their constituency monochromatically)[6] and stigmatic (the emotional harm from being racially classified) – and then argue that none of these plaintiffs has testified to suffering either one of these harms. Thus, for example, they argue that the plaintiff Karen Outlaw's satisfaction with her present state senator defeats any assertion of representational harm, and that the fact that she does not live near a part of the district where borders are racial makes impossible any stigmatic harm.

The Supreme Court has never demanded that a resident of a "gerrymandered district" prove with evidence that either one of these two constitutionally cognizable harms has afflicted him specifically. *See Bush*, 517 U.S. at

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[6] As Justice Thomas, quoting the Eleventh Circuit's Judge Hill, has put it, race-based districting "makes it unnecessary, and probably unwise, for an elected official from a white majority district to be responsive at all to the wishes of black citizens; similarly, it is politically unwise for a black official from a black majority district to be responsive at all to white citizens." *Holder v. Hall*, 512 U.S. 874, 907, 114 S. Ct. 2581, 2599 (1994) (Thomas, J., concurring in the judgment) (quoting *United States v. Dallas County Comm'n*, 850 F.2d 1433, 1444 (11th Cir. 1988) (Hill, J., concurring specially)).

957-58, 116 S. Ct. at 1951 ("[P]laintiffs Blum and Powers are residents of District 18, plaintiffs Thomas and Vera are residents of District 29, and plaintiff Orcutt is a resident of District 30. We stated in *Hays* that '[w]here a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action.'. . . . Under this rule, these plaintiffs have standing to challenge Districts 18, 29, and 30." (citation omitted; other alterations in original)); *Shaw II*, 517 U.S. at 904, 116 S. Ct. at 1900 ("[A] plaintiff who resides in a district which is the subject of a racial-gerrymander claim has standing to challenge the legislation which created that district, but . . . a plaintiff from outside that district lacks standing absent specific evidence that he personally has been subjected to a racial classification."). The Supreme Court has, moreover, found standing to exist for a Hispanic-surnamed plaintiff challenging a Hispanic-majority district, in which case it would be difficult to conclude (under the defendants' version of the standing rule) that the plaintiff suffered representational harm. *See Bush*, 517 U.S. at 957, 116 S. Ct. at 1951 (plaintiff Vera has standing to challenge pro-Hispanic gerrymander of house district 29). The defendants have cited no case that applies *Hays's* standing rule to require harm to be subjectively felt by the plaintiff. We therefore conclude that in the present state of the law it appears that injury-in-fact is conclusively presumed from the mere fact of residence in a gerrymandered district, independent of the plaintiff's subjective assessment of harm.

B. Laches

The defendants next argue that this action is barred by laches. It is not. The elements of laches are (1) an unreasonable delay in asserting a right or claim; (2) lack of excuse for the delay; (3) undue prejudice to the defendant. *See AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1545 & n.75 (11th Cir. 1986); *Citibank, N.A. v. Citibanc Group, Inc.*, 724 F.2d 1540, 1546 (11th Cir. 1984). Two elements are missing here.

First, the plaintiffs' filing of this action in 1997 was not unreasonable, and there was thus no cognizable delay. The consent decree that adopted the Reed-Buskey Plan was not entered until August 13, 1993, a little over a year before the 1994 election. *Shaw v. Reno*, 517 U.S. 630, 113 S. Ct. 2816 (1993), which many jurists perceived to be a major departure from older districting law under the Voting Rights Act, did not issue until June 28, 1993, and at that time *Shaw* had many people wondering how it affected Voting Rights Act jurisprudence and what *Shaw* prohibited. *See* Symposium, *The Future of Voting Rights After* Shaw v. Reno, 92 Mich. L. Rev. 483 (1993). Thus, to have challenged the Reed-Buskey Plan in time for the 1994 primaries, the plaintiffs would have had to have assembled, within a few short months, an action based on a mostly unsettled area of law. Reason did not demand this of them.

After the 1994 elections had passed, it did not matter when the plaintiffs sued, as long as it was in time for the 1998 election, which was the next one regularly scheduled and the only one left before new census data became

available. *See* Ala. Const. art. IV, § 46 ("In the year nineteen hundred and six, and in every fourth year thereafter, all the senators and representatives shall be elected."). Had the plaintiffs prevailed, in all probability they would have achieved the same results from filing in 1995 as in 1997. To assert that the plaintiffs dallied for four years, from the birth of the *Shaw* claim in 1993 until 1997, overlooks this circumstance.

Second, there is insufficient prejudice here, at least insofar as we are worried about the present remedial possibilities. We have already ruled from the bench that special elections in November 2000 under a new plan are off the table. As for the possibilities that remain, which we discuss in greater detail below, the defendants have if anything *benefitted* from the delay: the life of an injunction against use of these districts, which could inconvenience the State if any incumbent dies or resigns, will now be shorter and thus pose a lesser risk of affecting the State.

Because the defendants have failed to show either an unreasonable delay or any prejudice from it, they are not entitled to relief under any principle of laches.

C. Issue Preclusion

The last procedural bar the defendants raise is issue preclusion. The Alabama Supreme Court dismissed as moot the appeals of plaintiffs John and Camilla Rice in the parallel state-court litigation concerning districts in

Lee County, and according to the defendants that conclusion is binding in this litigation on the present plaintiffs. We disagree.

An Alabama court entered the judgment, and we therefore apply Alabama's law of judgments to determine the judgment's issue-preclusive effect. *See* 28 U.S.C. § 1738; *Allen v. McCurry*, 449 U.S. 90, 95, 101 S. Ct. 411, 415 (1980). According to its formal statement of the rule, Alabama forbids relitigation of an issue when "(1) . . . an issue in a prior action was identical to the issue litigated in the present action; (2) . . . the issue was actually litigated in the prior action; (3) . . . resolution of the issue was necessary to the prior judgment; and (4) . . . the same parties are involved in the two actions." *Smith v. Union Bank & Trust Co.*, 653 So. 2d 933, 934 (Ala. 1995). The first of these elements is unsatisfied here.

For collateral-estoppel purposes, "an issue is a single, certain and material point arising out of the allegations and *contentions of the parties.*" *Christian Television Corp. v. RCH Broadcasting*, 554 So. 2d 989, 992 (Ala. 1989) (emphasis added) (internal quotations omitted). The only party to raise anything akin to a mootness argument was the State, which asserted that the Rices had slept on their rights, and that their claims were thus barred by laches. In its argument that the Rices' delay would prejudice the state, the State addressed only the Rices' demand for redistricting in time for the 1998 elections. When the Alabama Supreme Court raised the mootness issue sua sponte in its December 18, 1998 opinion, moreover, it alluded only to the possibility of redistricting in time for the 1998 election, the last general election before 2000 census data became available. *See Rice v. Sinkfield*, 732 So.

2d 993, 993 (Ala. 1998) (addressing "[t]he plaintiffs' request for modification of the 1993 consent judgment"). All the supreme court apparently decided was that the passing of the 1998 election cycle mooted a request for redistricting before post-2000 reapportionment. Nowhere in the supreme court papers that we have did the possibility of court-ordered special elections in 2000, or of enjoining future use of these districts, either in special elections or in 2002, ever come up.

The different remedial requests we have had in this action distinguish the mootness issue here from the mootness issue before the Alabama Supreme Court. A question is moot under Alabama law if from its resolution "no practical relief can follow." *Rice*, 723 So.2d at 993. According to the supreme court, the question of the Reed-Buskey Plan's constitutionality is moot because even if the Rices got the relief they sought – redistricting – those new, constitutional districts could vanish before the next election, and the Rices would thus never enjoy representation in a constitutionally limned district. That analysis arguably shifts when the plaintiff wants a special election or an injunction against future use of the districting plan. A special election would of course afford relief. The plaintiffs do not necessarily get full relief from an injunction against future use of the districts, but in a state with as long a history as Alabama's of dropping the reapportionment ball (a history that we describe below), the relief could be meaningful. The defendants have thus failed to show that the supreme court had before it the same issue, as defined by the parties' contentions.

The issue is different, too, in another respect. The Alabama Supreme Court was applying Alabama law.

Under Alabama law, obviously, the Rices' action was moot. But it is not under the federal law that determines our jurisdiction; the U.S. Supreme Court has recently determined that a challenge under § 5 of the Voting Rights Act[7] to a districting plan is not moot simply because the plan will not necessarily be used again before decennial reapportionment; a precleared plan may be the basis for retrogression analysis following the next reapportionment, while a nonprecleared one may not. *See Reno v. Bossier Parish Sch. Bd.*, 120 S. Ct. 866, 871 (2000). *Bossier Parish* is not exactly on point, of course, because we are not dealing with § 5 or retrogression analysis. But the basic principle is the same; the Reed-Buskey Plan may well, as both the 1972 and 1983 Plans have in their turn, serve as the starting point for the next reapportionment. Alabama does not wipe the slate clean from one decade to the next, and in the same way that improper preclearance may infect retrogression analysis, a plan whose constitutional defects are left unidentified and unremedied could leave its own unconstitutional mark on the next plan.[8]

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[7] 42 U.S.C. § 1973c.

[8] The defendants have also raised mootness independently of issue preclusion. We reject the argument because, as we detail in the remedies section below, Alabama's long history of refusing to redistrict in a timely fashion makes it possible to provide the plaintiffs meaningful relief.

III. The Merits

A. Introduction

The procedural bars to this action thus disposed of, we turn to the merits of the individual claims. This case is different from any among the *Shaw* cases the Supreme Court has written to (and like only one district-court opinion the plaintiffs have cited, *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996)). In the *Shaw* cases, the plaintiffs resided in the majority-black or majority-Hispanic district that was the target and goal of the racial gerrymander, which was performed to create a black or Hispanic "safe seat" in the relevant legislative body. Here, by contrast, all the challenged districts except SD 29 are next door to the targeted safe-seat districts. But the next-door districts are not necessarily just leftovers from the engineering of the target district; they can be indispensable to its creation. The question as we see it, then, is whether a district that is racially drawn – but whose racial composition the districter cares about only as it affects a district whose racial composition is to be engineered – could be "racially gerrymandered" in the *Shaw* sense, and thus require strict scrutiny. We conclude that it may be.

For starters, the Supreme Court has never held that a plaintiff must show an intent to create a district of a certain racial composition in order to trigger strict scrutiny. He must, rather, show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 2488 (1995). The plaintiff discharges this burden by showing that the districter "subordinated traditional

race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.*, 115 S. Ct. at 2488.

"Placing a significant number of voters in the district" refers to the drawing of lines, because it is ultimately boundaries that place voters in districts. If there were any doubt on that point, first principles would allay it: From the start, the "essence" of a *Shaw* claim has been that "the State has used race as a basis for *separating* voters into districts." *Id.* at 911, 115 S. Ct. at 2486 (emphasis added). The act of segregation, not racial composition alone, inflicts the constitutional harm; when an intent to racially segregate overrides a respect for political subdivisions and geographical communities, it "convey[s] the message that political identity is, or should be, predominantly racial." *Bush v. Vera*, 517 U.S. 952, 980-81, 116 S. Ct. 1941, 1962 (1996).

The drawing of lines does not happen to a single equal-population district in isolation. A line drawn to achieve a certain racial composition in target district *X* also outlines next-door district *Y*; the placement of certain population in district *X* rather than district *Y* leads *Y* to look elsewhere for people; and so on in a series of ripple effects that diminish as you move away from the target district. These ripple effects may in the end not be racial. But close enough to "ground zero" there may be enough race-tainted ripple effects (for instance, the division of a neighborhood along racial lines that leave whites in the next-door district and blacks in the target district) that we can fairly say that race predominated in the district's peopling.

That notion of varying degrees of effect is why *Miller* requires the plaintiff to show that a "significant number of voters" must have been divided by race in the formation of the district. *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488. Insignificant race-tainted line drawing would not, presumably, send the message of race identity that entails the representational and stigmatic harms that *Shaw* interpreted the Equal Protection Clause to combat. We thus conclude that in this case any district where the districter's racial strategy had a significant enough effect on the configuration of the challenged district, the district triggers strict scrutiny and is "racially gerrymandered" for standing purposes. Once strict scrutiny is necessary, *Miller* affords the defendants the opportunity to advance a compelling interest to justify the racial classification. *See id.* at 920, 115 S. Ct. at 2490.

Our fact-findings compel the conclusion that SDs 21, 25, 29, and 30, and HDs 63, 75, and 86 require strict scrutiny. The defendants have advanced no sufficient compelling interest to justify the race-based districting, and accordingly we conclude that these districts all violate the Equal Protection Clause. The remaining districts, SD 34 and HD 89, however, do not satisfy this strict-scrutiny standard; they are thus not "racially gerrymandered," and for the reasons we explained in the standing discussion we must dismiss for want of jurisdiction the claims challenging them. Our detailed reasons follow.

B. General Background

1. Recent Reapportionment History

The Alabama legislature has historically had difficulty with reapportionment. A fifty-year refusal to reapportion – in flagrant disregard for Alabama's 1901 constitution – ended with the Supreme Court's decision in *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964). The same three-judge district court that had heard Reynolds in the early 1960s was required, in 1972, to impose its own reapportionment plan after the legislature again failed to discharge its constitutional duty following the 1970 census. *See Sims v. Amos*, 336 F. Supp. 924, 940 (M.D. Ala. 1972). The *Sims* plan introduced several districting features that have remained in subsequent plans, including the one whose districts are challenged here. First, the court reduced the number of representatives from 106 to 105 for the convenience of being able to "nest" three house-of-representative districts in each of the 35 senate districts. *See id.* at 936. Second, the court rejected, as inconsistent with the U.S. Constitution, Alabama's constitutional prohibition[9] of splitting counties into more than one senate district. *See id.* at 939 n. 20.[10] Third, the court refused to impose either multimember districts (which were previously used to keep populous counties intact) or to subordinate equal-population principles to county

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[9] *See* Ala. Const. art. IX, § 200.

[10] The court also implicitly decided that counties may, inconsistent with the Alabama Constitution, be forced to share representatives if the equal-population principle requires. *See* Ala. Const. art. IX, § 199 ("each county shall be entitled to at least one representative").

boundaries or precinct divisions. *See id.* at 934, 939. The resulting plan, which the court found to have been drawn without regard to race, had a total population deviation from the ideal equal population of 2.23% among house districts and 1.39% among senate districts, thus establishing a tolerance for some population departure. But it "substantially maintain[ed]" county integrity. *Id.* at 938; (*see also* Plfs.' Exs. 229, 230 (maps of 1972 court-imposed plan)).

The legislature did more in the 1980s, although reapportionment still required judicial intervention. The first legislative plan, enacted in October 1981, was rejected by the Department of Justice (DOJ) following submission for preclearance under § 5 of the Voting Rights Act, and the first plan's replacement came too late for the DOJ to review it properly. (It was ultimately rejected.) *See Burton v. Hobbie*, 543 F. Supp. 235, 236 (M.D. Ala. 1982). A three-judge district court thus permitted the regular 1982 elections to go forward with the unprecleared plan on an understanding that special elections would be held in 1983. *See id.* at 238. In doing so, the court rejected the plaintiffs' proposal to hold the 1982 elections under a plaintiff-drafted "Plan B." *Id.* at 236. In Judge Frank Johnson's words, Plan B was not "racially neutral but instead discriminate[d] against white citizens." *Id.* at 241. Plan B's proposed changes, according to Judge Johnson, pitted white, but not black, incumbents against one another and "packed" blacks in "safe" black districts by joining rural

black populations in the Black Belt[11] with distant urban black populations. *Id.*

In early 1983, following the elections, the legislature enacted a plan drafted by Dr. Joe Reed (then a member of the Montgomery City Council) that passed DOJ scrutiny. This 1983 Plan came before the *Burton v. Hobbie* three-judge district court on a request not to order special elections. This time, the court had nothing but praise for the Plan and its racial balance:

> [The 1983 Plan] is an exemplary reapportionment plan. In the entire state there is not a single instance of dilution of the black vote. The plan conforms closely to county lines, and population variances between districts are acceptable. The plan appears to represent a genuine legislative concern for maintaining the integrity of various economic, political and racial communities. It also represents a concerted effort to minimize the number of contests between incumbents. And though [the Plan] is similar to plaintiffs' Plan B, which had been previously submitted to this Court, we find that it has been sufficiently modified to satisfy our concerns as to its racial neutrality. . . . [The Plan] violates neither the State nor the Federal Constitutions.

Burton v. Hobbie, 561 F. Supp. 1029, 1035 (M.D. Ala. 1983). Special elections were held in 1983 under this Plan, as were the 1986 regular quadrennial elections. The 1983

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[11] The Black Belt is so named, of course, for its dark prairie soil and not for its racial composition. It is a swath of land that stretches roughly from Columbus, Georgia to Columbus, Mississippi through the center of Alabama, including the towns of Tuskegee, Selma, Demopolis, and Eutaw.

Plan is thus a valid and useful baseline for comparison to the challenged plan on the question of respect for traditional districting criteria such as compactness, contiguity, and respect for relevant communities of interest – although of course this usefulness diminishes where there have been significant population changes.

Following the 1990 census, the legislature made an effort to enact a new districting plan. By early 1993, there were several proposed plans in circulation. One – an amended version of the Reed-Buskey Plan under challenge here – passed the Alabama House of Representatives, but never made it out of committee in the senate; another, the Senate Committee Plan, passed the senate but made no headway in the house. In the spring of 1993, the group that we call here the Sinkfield Defendants sued the Alabama Secretary of State in state court for violation of the Equal Protection Clause because the State had failed to redistrict. The State, represented by the secretary of state, entered into a consent decree agreeing to the use of the Reed-Buskey Plan.[12]

The State then sought preclearance from DOJ. As might be expected from the nature of § 5 preclearance, the submission letter touted the racial features of the Plan to the exclusion of all others except the one-man, one-vote principle. In particular, the letter announced the

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[12] The court-adopted Reed-Buskey Plan differs in only minor respects from that originally unveiled by Dr. Joe Reed, its creator.

creation of new majority-black house districts in Montgomery, Mobile, the Black Belt, and the Wiregrass,[13] and the formation of new majority-black senate districts in the Black Belt and east-central Alabama. DOJ granted preclearance, and the state court imposed the Reed-Buskey Plan for use in subsequent elections. The legislature made no further redistricting attempts.

2. The Reed-Buskey Plan

The Reed-Buskey Plan, like the 1983 Plan, was the brainchild of Dr. Joe Reed. Dr. Reed disagreed with the three-judge court that approved the 1983 Plan. According to him, the 1983 Plan was not "equitably fair," insofar as it did not achieve proportional black representation in both chambers of Alabama's legislature. It was, rather, the best that Dr. Reed and his political allies could get. The mood of the early 1990s was more receptive to Dr. Reed's goal of "equitable fairness,"[14] however, and Dr.

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[13] "Wiregrass" is the name given the region of southeast Alabama that includes Dothan, Ozark, Enterprise, and Troy.

[14] The history of *Shaw* cases in other jurisdictions and the testimony of Dr. Weber in this case show that in the early 1990s it was widely assumed that a state could (and, according to DOJ, had to) draw district lines with the primary intent of maximizing election of black officials. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 907, 115 S.Ct. 2475, 2484 (1995). The pre-*Shaw* idea that race could legitimately predominate in the drawing of majority-minority districts is illustrated in this case by the State's letter to DOJ seeking preclearance, which emphasizes the Plan's deliberate creation of enough majority-black districts to assure nearly proportional representation in the legislature.

Reed thus set out to maximize the number of black representatives and senators elected to the legislature by maximizing the number of black-majority districts.[15]

The Reed-Buskey Plan builds on the foundations of the 1983 Plan, and the 1972 Plan before it. In most of the state, the Plan retains the same core districts and numbers, and it continues to nest three house districts within each senate district everywhere except in Calhoun and Talladega Counties. But to achieve Dr. Reed's goals with Alabama's largely biracial demographics, Dr. Reed had to take advantage of residential segregation where it occurred to separate white voters from black voters and thus maximize black-voter influence, as measured by the likelihood of electing black candidates. Dr. Reed worked with districting software that provided him with a constant display of racial data, down to the census-block level. With these tools he succeeded in nearly eliminating what some in this litigation have referred to as "integrated" districts: those composed of a near 50-50 split of black and white population, or having a large black minority. The Reed-Buskey Plan has only one senate district with a black population between 30 and 60% of the

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[15] We treat Dr. Reed as *the* districter, like the legislature in the Supreme Court's *Shaw* cases, because no one else had the overriding decisional power over the district outlines that he did. Some legislators made suggestions, but those who testified did not admit to participating in the actual line-drawing. Moreover, the state official who agreed to the 1993 consent decree, Secretary of State Billy Joe Camp, testified in deposition that he had no involvement in drawing the Plan and did not, in evaluating the settlement, examine the Plan for any districting criteria such as respect for communities and compactness.

total. By contrast, the "Pokey" Plan[16] – the 1983 Plan with 1990 census data superimposed – had five such districts. The Pokey Plan had 15 house districts that are between 30 and 60% black; the Reed-Buskey Plan has only one.

The statistics show another aspect of Dr. Reed's strategy as well. If voters split on racial lines – and Dr. Reed had to assume this for his strategy to make any sense – "packing" blacks in majority-black districts can reduce overall political influence as much as "cracking" blacks by planting them as minorities in majority-white districts.[17] Black votes are "wasted" in supermajority districts once a threshold of control is crossed, and those votes are better off forming a smaller majority in two districts. Attaining a happy medium between packing and cracking required racial fine-tuning around the edge of all districts with a majority-black population to assure a proper mix of black citizens and white "filler people."[18]

The statistics show that Dr. Reed did a good job. If the ideal happy-medium district has a population between 60 and 70% black, there are seven ideal senate districts under the present Plan, as compared to two under the Pokey Plan. Twenty-three of the 105 house

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[16] Counsel represented that this Plan takes its name from a computer at the offices of the Permanent Committee on Legislative Reapportionment.

[17] For use of these terms, see, *e.g.*, Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 Harv. L. Rev. 2276, 2283 (1998).

[18] For use of this term, see, *e.g.*, John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 Harv. L. Rev. 576, 584 (1997).

districts are between 60% and 70% black under the present plan; the Pokey Plan had only eight such house districts. In so delicate and successful an operation, Dr. Reed could not be indifferent to the racial composition of districts bordering his targeted black-majority districts: in biracial Alabama, if Dr. Reed left too many whites next door, he would skirt too close to packing; at the same time, though, he could not "waste" any black votes in the next-door districts because the votes were needed to maximize the number of ideal black districts. In the more racially mixed western and southern parts of the state, this meant as a practical matter that Dr. Reed had to pay special attention to the racial composition of most of the districts.[19]

The strategy sacrificed respect for local government units.[20] Under the 1983 Plan, 14 of Alabama's 67 counties

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[19] Whenever we describe senate-district districting strategy, we are for convenience speaking in shorthand on a certain level. Dr. Reed consistently testified that he drew lines at the house-district level, and then nested the house districts to form a senate district, rather than drawing the senate district and then dividing it into house districts. Dr. Reed did not, however, arrive at his senate districting plan by accident, and his house districting was colored by the nesting possibilities of that district: for example, as Representative Brian Melton testified, HD 72 was drawn to stretch into Tuscaloosa County so that it would adjoin HD 70 and thus make them nesting candidates.

[20] This was in spite of the fact that the Supreme Court has recognized the importance of representation for these subdivisions in state legislatures by relaxing the strict population equality required for congressional districts when it is necessary to preserve the cohesion of cities and counties. *See Mahan v. Howell*, 410 U.S. 315, 93 S. Ct. 979 (1973); *Gaffney v.*

were split between senate districts. The Reed-Buskey Plan often favors census-block lines over county lines; it thus splits 26 counties between senate districts, and there is no apparent reason why some counties – such as Dale or Lowndes – needed to be cleft to satisfy the equal-population demands of the U.S. Constitution. Besides dividing the major cities, which all recent plans have had to do to achieve equal population, the Reed-Buskey Plan splits a host of small towns, many in the challenged districts. In many of the divided towns, such as Ft. Deposit, Evergreen, Abbeville, and Grove Hill, the racial composition of populations on either side of the district line differs dramatically.

There was also a cost to incumbents, perhaps explaining the Plan's lack of legislative success. Under the Reed-Buskey Plan, incumbents were pitted against one another in seven house districts and two senate districts. All of the incumbents so paired were white.

3. The Political Context

Dr. Reed is a long-time member of the Alabama Democratic Conference (ADC), which he presently chairs, and whose interests Dr. Reed represented when he drew the Reed-Buskey Plan. The ADC, along with the New South Coalition (NSC) and local groups such as the Jefferson County Citizens Coalition (JCCC), are political groups organized to advance black political interests. The ADC has almost no white involvement. This lack of

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Cummings, 412 U.S. 735, 93 S. Ct. 2321 (1973); *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332 (1973).

involvement is low enough that one of the county-level members in Tuscaloosa believed that the ADC did not permit whites to vote, and Dr. Jerome Gray, the ADC's state field director for the past 20 years, could believe (admittedly in error) that the ADC would permit whites to participate as supporting members only and not as active members.

The ADC is well-organized and influential. Its local, county-based chapters run get-out-the-vote campaigns to maximize black-voter participation; recruit and investigate candidates; distribute sample ballots marked with ADC-endorsed candidates; and provide voting assistance and monitoring on election days. In most races, ADC-endorsed candidates (who are always Democrats) carry a large majority of the black vote. In the 1994 Democratic primaries for the state legislature, ADC-endorsed candidates won a majority of the contested races for both the house and the senate. Thanks to the efforts of the ADC, the NSC, and other such groups, black-voter participation rates in Alabama are often comparable to, if not higher than, white rates.

The ADC, NSC, and other groups are well represented in the present Alabama legislature. Only one black senator is "independent"; the other seven are affiliates of either the ADC, the NSC, or the JCCC. In the house of representatives, the ADC counts twelve affiliates, the NSC an overlapping five, and the JCCC five; there are only three "independents."

What the ADC does not have, however, is a large body of card-carrying members. It resembles the Democratic and Republican Parties in that its affiliates are

mostly unknown in Alabama, which has no party-registration system; only a small cadre of activists are counted as members. It is thus impossible to know precisely where ADC supporters live without relying on proxies such as race or Democratic voting habits as reflected in election returns. In fact, the Reed-Buskey Plan could not have relied even upon Democratic voting habits to measure regional ADC membership in the electorate; voting returns are available only down to the precinct level, and in many of the challenged districts here, voting precincts were split (often on racial lines). Race demographics, on the other hand, were available at the census-block level, and Dr. Reed thus relied upon race as a proxy to measure local ADC strength.

C. *The Challenged Districts*

Dr. Reed's global strategy matters in this case only in the few areas of the state where the plaintiffs have challenged the districts in which they live. The plaintiff Dr. Ricardo Montiel lives in the Downs neighborhood on the south side of Tuscaloosa, and he thus votes in SD 21 and HD 63. Daniel Brown lives in the Carriage Hills subdivision of Montgomery, between the Eastern Bypass and Bell Road, and thus votes in SD 25. Genae Spinks lives in the Halcyon subdivision near Montgomery, south of I-85 and west of Taylor Road; she votes in SD 25 and HD 75. Peggy Kelley lives in Prattville, which is in SD 30. Karen Outlaw lives in Troy, and she votes in HD 89 and SD 30. Bibb Gunter lives just outside Ross Clark Circle on the west side of Dothan, and he votes in SD 29 and HD 86. Finally, Dr. Gonzalo Montiel lives in Mobile near the northeast

side of the intersection of Old Shell Road and McGregor Avenue, and he thus votes in SD 34.

With the exception of an equal-population principle that permitted up to 5% deviation from exact equality, race predominated over all other factors in determining the layout of districts around Tuscaloosa, Montgomery, the central Black Belt, the Wiregrass, and Mobile. The effect on each district differed, however. The background on each district appears below, along with our conclusion on the predominance of race in each district.

1. West-Central Alabama – SD 21 and HD 63

Under the 1983 Plan, the region around Tuscaloosa was divided among three senate districts and five house districts.[21] Old SD 21 consisted of the northern part of Hale County and the southern half of Tuscaloosa County, divided from the rest of the county, which was in SD 5, mostly along U.S. Highway 82 and the Black Warrior and Sipsey Rivers. SD 5 also included all of Pickens County. In 1990, SD 21 was about 30% black; SD 5 was only 13% black. Across the Tuscaloosa-Greene county line to the southwest lay SD 23, which extended from the Mississippi state line through the Black Belt to Lowndes County, just west of Montgomery. That swath of central Alabama is majority black, and its demographics were reflected in SD 23's 68% black population. In 1990, old SD 21 had 2354 inhabitants above the 5% overpopulation threshold adopted by Alabama's Permanent Legislative

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[21] Maps of old and new SD 21 and HD 63 appear in Appendix A to this order.

Committee on Reapportionment; old SD 5 was well within the permissible population range; and SD 23 was 7934 persons short of that range. Some redistricting would have been constitutionally required in any event.

Dr. Reed admitted that he intended to create a majority-black senate district in west Alabama. To do that he had to separate whites from blacks in the Tuscaloosa area. The Tuscaloosa area thus felt the repercussions of Dr. Reed's strategy to divide old SD 23's core counties into two majority-black senate districts. In the 1993 Plan, SD 23 preserves its middle-Black Belt core in Lowndes, Dallas, and Wilcox Counties, but it makes up for the population lost in the western Black Belt by extending tentacles south and southwest to pick up black populations in south Alabama towns such as Evergreen, Grove Hill, Monroeville, Thomasville, and Linden, all of which are split on racial lines. Meanwhile, the western part of old SD 23 (Perry, Hale, Greene, and Sumter Counties) forms the core of a new SD 24. (Old SD 24, which occupied all or part of Autauga, Bibb, and Chilton Counties, does not overlap new SD 24 anywhere.) To compensate for the loss of the eastern Black Belt population that remained in old SD 23, new SD 24 reaches northward into Tuscaloosa, where it grabs populations that are black enough not to reduce the black majority already present in the new district's core counties. To get enough people in Tuscaloosa to satisfy equal protection in SD 24 without reducing its black majority, old SD 21 had to be purged of much of its black population. It could not, moreover, be permitted to take in large numbers of blacks in other

areas, because that would have imperiled the global strategy; thus, SD 21 made up for its lost black population by moving west into majority-white Pickens County.

The senate-district strategy in central and west-central Alabama also drove the house redistricting in the Tuscaloosa area. Under the 1983 Plan, the Tuscaloosa area was divided among five house districts. SD 21 nested HDs 61, 62, and 63. HDs 61 and 63 occupied almost all of Tuscaloosa proper, divided among major thoroughfares such as University and McFarland Boulevards. HD 62 covered the southern and eastern parts of rural Tuscaloosa County, running over into the northern quarter of Hale County to the south of Tuscaloosa. The northern and western parts of Tuscaloosa County were shared between HD 14, which extended north into Walker County, and HD 15, which extended west to include all of Pickens County. HD 14 and 15 were nested (along with HD 13) in SD 5. Of these house districts, only HD 61 had a black majority in 1990, which was 67%. HDs 63 and 62 had black minorities of 15 and 18%, respectively. HD 15 had a white majority of 72%, while HD 14's white majority was 95%.

The shift to the Reed-Buskey Plan altered the area's house district lines dramatically, but it changed the overall regions they occupy in only one significant way: old HD 62 was deprived of southwest Tuscaloosa County. The blacker part of this area, which runs roughly along the Black Warrior River, has joined HD 72, which runs south through the Black Belt into southern Marengo County, eighty miles away. The whiter part of southwest Tuscaloosa County has joined new HD 61, which also occupies most of Pickens County and the part of

Tuscaloosa County formerly occupied by HD 15. Old HD 61 changed shape and number – it is now HD 70 and is a lot less regular – but sits in the same place relative to the other house districts in the area. HD 63 retained its position and number, but it too underwent significant changes in shape. HDs 61, 62, and 63 are still nested in SD 21; HDs 70, 71, and 72 are nested in SD 24.

The extension of new HD 72 into Tuscaloosa County and the reconfiguration of HD 63 and new HD 70 serve two purposes in support of the senate districting scheme. First, they connect majority-black areas of the Black Belt to the black-majority areas of Tuscaloosa County, thus ensuring an ideal majority-black population in SD 24. Second, as Bryan Melton (the current representative for HD 70 and a representative since 1982) explained, the reconfiguration of old HD 61 into HD 70 served its own house-level purpose, as well. He discussed with Dr. Reed the problem of underpopulation in his majority-black district under the Pokey Plan. Rep. Melton also talked about the necessity of "helping his numbers" by ensuring a black majority of at least 65%; according to him, both the northern and southern eastbound protrusions from his district into HD 63, which removed black population from HD 63, were meant to achieve this result.

Dr. Reed's race-based strategy left its mark all over the borders of SDs 21 and 24 and their nested house districts. Starting at the Hale-Tuscaloosa county line, the SD 21-24 boundary travels roughly to the north along a railroad track and then through Tuscaloosa, and along the way there are no fewer than eight deviations of various sizes, all of which thread their way among census blocks to put the majority-black ones in SD 24 and the majority-

white ones in SD 21. The line takes a west-bound turn in Northport, after the last of these eight irregularities (which excludes the black part of Northport from SD 21) and then travels back down to the Greene-Tuscaloosa county line. Along the way, the district boundary follows the Black Warrior, then swoops south to put a majority-white census block in SD 21, and then leaves the river again to separate a majority-white area from a majority-black area. The line between HD 63 and HD 70 splits nine voting precincts previously established by Tuscaloosa County; four of the split precincts have a black majority on one side and a white majority on the other.

Population statistics also betray the racial strategy. The part of Tuscaloosa County in SD 21 is 86% white; the SD 24 part of the county is 64% black. Within the City of Tuscaloosa, 84% of the population in SD 21 is white; only 35% of the population on the other side is. Within Tuscaloosa County, enough whites – but not too many – have been put in SD 21 to achieve the happy medium of black-population proportion between packing and cracking.

The defendants point to different reasons, none of them persuasive, for explaining each irregularity in the boundaries of these districts. Senator Phil Poole, a Democrat who represents SD 21, testified that each large irregularity had an independent reason to exist. We reject this testimony; other evidence in the case is to the contrary.

Sen. Poole's explanation for the Holt extension into both SD 21 and HD 63, which was corroborated by Rep. Melton and other witnesses, is that Sally Cook, an ADC member who lives in Holt, wanted to run for senate in a

black-majority district. That may explain why Holt lies in a long northeastward extension of SD 24 into SD 21, but it does not explain why Dr. Reed divided the tiny community of Holt between majority-white and majority-black census blocks, as the demographic maps show; nor does it explain the race-tailored borders of the northeastward extension. Sen. Poole's explanation for the long eastward extension of SD 24/HD 70 down U.S. Highway 82 south of Tuscaloosa was that he suspected that several subdivisions with $250,000 houses would be developed in the then-sparsely peopled area, and that he wished to exclude these likely Republican voters from his district. That is inconsistent with SD 21's extensions to take in other affluent sprawl zones, such as the one described by the witness Curtis Travis on the west side of State Highway 63 south of Tuscaloosa. The only apparent difference between Curtis Travis's sprawl area and the one excluded from SD 21 is that the 1990 census data show one to be majority black and the other majority white. Sen. Poole explained the racial cutout into Northport only by pointing out that it had been there before, and he admitted that he would have preferred to keep in SD 21 the majority-black finger of land west of the Black Warrior River that Dr. Reed put in SD 24.

The evidence thus shows a regional race-based strategy in west-central Alabama that substantially and necessarily redrew SD 21; without excising black Tuscaloosa-area population from SD 21 to give it its squashed-butterfly shape, Dr. Reed could not have created the new SD 24. The borders of SD 21 and HD 63, moreover, wind through the most populated area in the region, separating a significant number of voters in a way explainable only

by race. We accordingly conclude that both of these districts warrant strict scrutiny.

2. Montgomery Area – SD 25 and HD 75

Under the 1983 Plan, Montgomery was divided between two senate districts: 25, which was all but the northwest part of Montgomery County, and 26, which joined the northwest part of Montgomery County with the southern third or so of Elmore County.[22] Old SD 25 was 78% white in 1990; old SD 26 was 65% black. SD 25 under the Reed-Buskey Plan has changed so much from the same-numbered district in the 1983 Plan that the parties dispute whether the 1983 Plan's district is relevant even as a comparator. The new SD 25, which now replaces old SD 26 as the county-line crosser, has two lobes: a southern lobe that consists of in-town majority-white parts of Montgomery joined to a majority-white sprawl zone east of Montgomery, and a northern lobe that includes sprawl zones in Elmore County. The two lobes are linked by a three-mile wide bridgeless[23] strip of Tallapoosa River bottomland that includes the Montgomery city dump. This new SD 25 is 86% white, while the new SD 26, which consists of the portion of Montgomery County not occupied by SD 25, is 70% black. What has happened is a rearrangement of the two districts with a

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[22] Maps of old and new SD 25 and HD 75 appear in Appendix B.

[23] At least, no bridge appears on the 1992 and 1994 maps that are in evidence. The 1999 Alabama State Highway Department's state map, which is not in evidence, shows a toll bridge apparently in the district.

result that one is whiter, and the other blacker, than before, but we still have one majority-white senate district and one majority-black senate district.

This outcome may seem unexpected, even given Dr. Reed's stated goal of maximizing black membership in the legislature, because it effectively packs blacks in new SD 26. At the house-district level, however, there is an explanation. In 1990, the Montgomery area had two majority-black districts and four majority-white districts, two of which had a significant black minority. Under the Reed-Buskey Plan, the Montgomery area is divided into three supermajority-white house districts and three supermajority-black districts. The two former "integrated" districts were HD 76 and HD 75, which consisted respectively of southern Elmore County and the fringe-suburban and rural parts of Montgomery County. In the Reed-Buskey Plan, HD 75 has moved into southwest Elmore County, and its share of Montgomery County has shrunk to just the majority-white eastern suburban fringes of Montgomery, while HD 76 has left Elmore County completely to cover the southern and remaining eastern parts of Montgomery County. By removing the suburban-fringe whites from eastern Montgomery County and joining them with white southwestern Elmore County, Dr. Reed created another supermajority-black district in Montgomery County.

The racial-demographic maps bear out this explanation for the do-si-do that SDs 25 and 26 and HDs 75 and 76 performed between the two plans. New SD 25's area of Montgomery County is conspicuously white by design: its eastern boundary runs neatly between the edge of majority-white suburbia and the mostly black rural areas

around the east-Montgomery County communities of Waugh and Cecil. The western boundary of SD 25, moreover, runs from the south, dividing the whiter east half of Montgomery from the blacker west half, and then the western boundary retreats eastward as it approaches the Tallapoosa River, both to exclude from SD 25 the black neighborhoods on Montgomery's northeast side and, in a large detour, to put the Maxwell Air Force Base Gunter Annex in adjacent SD 26.[24] On the other side of the line, in SD 26 and HD 76, Waugh, Cecil, and the rest of eastern and southern rural Montgomery County are about 52% black; this percentage is boosted by the marriage of the otherwise rural district with a little piece of inside-the-bypass Montgomery that is much more populous and 73% black.

Unlike in Tuscaloosa, the defendants presented no specific reason to explain the new Montgomery-area configuration other than Dr. Reed's max-black strategy. No one could assert that incumbents or other political aspirants were to blame: Larry Dixon, SD 25's incumbent, did not request any of the configuration of his district, which in fact according to him made his campaign more difficult because he had to familiarize himself with Elmore County. Nor was there any incumbent-protection explanation for HD 75 – its incumbent, a Democrat, lost in this district that has since elected Republicans. The defendants point to general communities of interest, but for the general reasons we explain in detail below, we cannot

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[24] There was evidence that districters like military installations because they house politically inactive populations that are ideal filler people.

find that respect for nonracial communities of interest figured into this line-drawing.

Race was thus the predominant factor at work in Montgomery-area redistricting, and SD 25 and HD 75 are instrumental to the construction of a new majority-black house district in the Montgomery area because they remove and store whites who rendered old HD 75 an "integrated" district. The boundaries of these two Montgomery districts furthermore follow racial lines, determining racially where many Montgomerians vote. We therefore conclude that these two districts, like the Tuscaloosa-area districts, merit strict scrutiny.

3. Central Black Belt – SD 30

Old SD 30, which consisted of four whole counties (Butler, Crenshaw, Pike, and Dale), was a little underpopulated in 1990.[25] Some change was necessary to comply with equal-protection demands. The two-lobed district that the Reed-Buskey Plan formed, however, is bizarre. Its southern lobe is still all of Butler, Crenshaw, and Pike Counties, but the old district ceded the part of Dale County that is south of a line apparently tailored to exclude the City of Ozark's black population. The new district's northern lobe is Autauga County and a small piece of southwestern Elmore County. Between these two parts is a 25-mile-long land bridge through eastern Lowndes County that hugs the Montgomery County line; at several points, the land bridge is well under a mile

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[25] Maps of SD 30 under both the 1983 Plan and the Reed-Buskey Plan appear in Appendix C.

wide.[26] No road runs through the land bridge, and thus to get from the southern part of the district to the northern part without leaving the district, one would have to walk.

Dr. Reed's statewide racial strategy neatly explains this configuration. Creating a compact district by extending the district a little to the north, into Lowndes County or southern Montgomery County (as the Senate Committee Plan did), would have disserved his global goal in two ways. First, by removing black voters from SD 23 and HD 76, it would have imperiled one of two additional majority-black districts: Lowndes County's black population was destined for the creation of two majority-black senate districts (23 and 24) in the Black Belt in place of the one that existed before (old 23), and rural Montgomery County's black population helped create majority-black HD 76, a new majority-black district in the Montgomery area. Second, the rural population of adjacent Lowndes and Montgomery Counties would not be enough to compensate for the loss of southern Dale County, which would have to be removed from SD 30 to satisfy the racial strategy for the Wiregrass, discussed in more detail below.

Joining 79% white Autauga County into SD 30 solved these problems. The incumbent Senator Wendell Mitchell, moreover, preferred having Autauga County in his district because under the 1972 Plan, when SD 30 included

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[26] For instance, in T. 13N, R. 16E, sec. 35; T. 14N, R. 16E, sec. 13; T. 15N, R. 16E, sec. 36; and T. 15N, R. 16E, sec. 18. (*See* Pls.' Ex. 346.)

Lowndes and Autauga Counties, Mitchell had been successful in Autauga. The only problem left once it was decided to put Autauga in SD 30 was joining Autauga to a district that was 25 miles away at its closest point. Dr. Reed opted for a land bridge to solve that problem, and again the solution had a racial twist: the eastern edge of Lowndes County, through which the land bridge runs, is majority white, and the boundary between SD 30 and SD 23 hews to the contours of those majority-white census blocks. The SD 30 part of Lowndes County is 79% white; the rest of Lowndes County is 80% black.

Dr. Reed also gratuitously split the small south Lowndes town of Ft. Deposit (1990 population: 1240) along racial lines. The part of Ft. Deposit in SD 30 is 90% white; the rest of the town is 86% black. Both SD 30 and SD 23 are underpopulated, but SD 30 more so than SD 23. SD 30 thus needed either a piece of Ft. Deposit or something else to stay within 5% of the ideal population. But that does not explain why the divide of Ft. Deposit needed to be so neatly on racial lines, or why the 300 or so additional souls that needed to be transferred from SD 23 (or some other district) could not have been chosen geographically rather than racially.

Apart from protection of communities of interest, which we discuss below, the defendants have sought to justify this configuration only with Senator Mitchell's desire, expressed to Dr. Reed, to have Autauga County in his district. There is no reason to disbelieve this, but it does not explain the land bridge. Senator Mitchell candidly admitted that he did not express any opinion to Dr. Reed on the inclusion of Lowndes County in his district. Including all of Lowndes County and dropping Dale

County altogether, rather than carving the land bridge out of eastern Lowndes County, would have created a senate district that consisted solely of intact counties and whose population would have been only 2.65% below the ideal; the present SD 30 is 4.84% below ideal. There is thus no reason other than race to explain how old SD 30's underpopulation problem was solved.

SD 30 therefore owes its configuration predominantly to race, and that race-driven configuration determined whether a significant number of people ended up in or out of the district. The district warrants strict scrutiny.

4. Wiregrass – SD 29 and HDs 86 and 89

The districting of the Wiregrass and adjacent areas changed a lot between the 1983 and 1993 Plans.[27] The 1983 Plan's senate districts respected county lines throughout the area. Dale County was entirely in SD 30; Houston, Henry, and Geneva Counties were in SD 29; Covington, Coffee, and Escambia Counties composed SD 31; and Macon, Bullock, Russell, and Barbour Counties made up SD 28. Dale, Henry, and Houston Counties are now divided; Houston and Dale Counties are each split among three senate districts.

Because of equal-population constraints, house districts in the area were less respectful of county lines, but they were still more regular. SD 29 nested HDs 85, 86, and 87, then as now. HD 85 was all of Henry County and parts of northern and eastern Houston County. HD 86

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[27] 1983 and 1993 maps of the challenged districts are in Appendix D.

was three-fourths of Dothan and a swath of central Houston County. HD 87 was Geneva County and a small part of western Houston County, all outside the City of Dothan. Dale County contained both HD 88, which occupied its southern two thirds, including all of Ozark,[28] and HD 89, which comprised the northwestern third of the county and all of adjacent Pike County.

The present SD 29 comprises all of Geneva County, most of Houston County, and jagged fragments of Henry and Dale Counties. The fragments are all within HD 85, which snakes from the majority-black northeast side of Dothan up through the west side of Henry County, along the way splitting the towns of Headland and Abbeville, and thence meanders through the middle of Dale County, cleaving Ozark and Daleville. HD 86 is most of Houston County, except for the part of Dothan put in HDs 85 and 93 and the piece of western Houston County that is in HD 87. HD 89 consists of Pike County and the northern part of Dale County, including a snippet of the City of Ozark.

The only way to explain these changes is that Dr. Reed wanted to squeeze a single majority-black house district out of the white-majority Wiregrass. To do so, the demographic maps show, he strung together majority-black census blocks with narrow connecting strips. These blocks included 965 of Abbeville's 1115 blacks; 845 of Headland's 1088 blacks; and 2689 of Ozark's 3165 blacks. The portions of Houston County the district travels

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[28] When SD 30 left the southern two-thirds of Dale County, HD 88 went along. The present HD 88 consists of Autauga County and a small piece of Elmore County, over a hundred miles to the northwest of Dale County.

through are 82.6% black; the portion of Henry County is 65.5% black; and while the Dale County joints of the Snake are only 28.7% black, that percentage compares to 7.7% and 11.7%, respectively, of the areas of Dale County in HD 89 and HD 93.

Even with this careful attention, because of the region's racial composition Dr. Reed arrived at a house district, HD 85, whose voting-age population is majority white, even though its total population is majority black. This difficulty of developing a black-majority district in the Wiregrass may explain the extension into Dale County, which ends up at Fort Rucker, a major military base. There was evidence to suggest that Dr. Reed believed that military bases provided ideal populations of filler people because many of the citizens living there would either vote elsewhere absentee or take little interest in local politics. (HD 85 has in fact elected a black representative in 1994 and 1998; the evidence does not tell us whether this was because whites participated at lower rates than blacks, or because the black candidate, Locy Baker, enjoyed white support.)

HD 85's nesting inside SD 29 taints SD 29 with the same racial raison d'etre as HD 85 itself. Being on HD 85's periphery puts HDs 89 and 86 within the zone of effects of HD 85. HD 86 occupies more or less the same area it did under the 1983 Plan, but its border with HD 85 through Dothan – whose citizens supply the lion's share of the district's population – is racially determined; the border travels between majority-white and majority-black census blocks to divide Dothan on racial lines. The part of Dothan (whose total HD 85 and HD 86 population is 30,837) in HD 85 is 90% black; the part in HD 86 is 85%

white. HD 89's border with HD 85 has a similar racially motivated look to it, especially around the City of Ozark, where the line takes a detour to include the majority-black part of Ozark in HD 85.

Dr. Reed admitted to his motivation for drawing HD 85, and the defendants do not point to any specific evidence to explain the race-based boundaries of HD 86 or HD 89. They certainly could not rely on incumbent protection or requests, as they did in other areas. The incumbent in old HD 85 was John Beasley, who lived just across the Houston-Henry county line near Columbia, a small town on the Chattahoochee River in northeast Houston County. Rep. Beasley's house was left out of the new HD 85. The Reed-Buskey Plan as originally unveiled (but not the one in the consent decree), moreover, deliberately put Rep. Beasley's house in HD 86, where his friend Joe Carothers was the incumbent: the boundary of HD 86 took one small detour to pick up three houses in southern Henry County, one of which was Rep. Beasley's.

SD 29 thus owes its bizarre shape to the nesting of HD 85, which exists for no other reason than to create a majority-black house district in the Wiregrass. HD 86, while only on the periphery of the engineering of HD 85, was significantly affected because its most populous portion – that within the City of Dothan – is divided from HD 85 on exclusively racial lines. Both of these districts thus merit strict scrutiny under the Equal Protection Clause.

HD 89, on the other hand, was affected by Dr. Reed's Wiregrass strategy only along its southern border, where HD 85 stretches to swallow some majority-black census

blocks. This part of the district is sparsely populated, and there were enough other small black populations around in the region that it is hard to say that HD 85 could not have been created without these particular racial detours along HD 89's borders. We cannot conclude, therefore, that the effect of race on HD 89 was significant enough under *Miller* to trigger strict scrutiny.

5. Mobile – SD 34

Under the 1983 Plan, SD 34 occupied the northern and western parts of rural Mobile County. On the southern part of its eastern boundary, it had a short, wide extension into the City of Mobile. This extension stopped at I-65 (also called the "beltline"), thus including only the suburban neighborhoods outside and not the integrated in-town neighborhoods east of the beltline in Midtown Mobile. SD 34 changed little in configuration and position under the Reed-Buskey Plan. New SD 34 still includes most of rural west and northwest Mobile County, and it still has a protrusion on its southeastern side that takes in Mobile's western sprawl zones. Now, however, the protrusion has grown a jagged protuberance inside the beltline to include some majority-white census blocks in Midtown while leaving out majority-black blocks.

The racial composition of Mobile-area senate districts did not change dramatically between the 1983 and 1993 Plans. In 1983, there were two districts (32 and 34) that had very small black minorities, another (35) that was about one-quarter black, and another (33) with a black

supermajority. The racial compositions of the current districts bearing those numbers are in the same ballpark under the Reed-Buskey Plan.

The change has been in the nested house districts, where Dr. Reed created a new majority-black district. In 1983, Mobile County had ten house districts: six had a large white majority; three had a large black majority; and one had a black minority of 44% of the total population. That last district, numbered 97, is gone under the present plan, which has six white-majority districts and four black districts with a black population of around 65% of the total. The old "integrated" district, HD 97, lent its number to a majority-black district whose lines generally follow those of old HD 103. Old HD 97 was bounded on the east by Ann Street, on the north by Threemile Creek (and maybe Dauphin Street for the western part of the northern boundary; we cannot tell perfectly from the small-scale maps), on the west by the beltline, and on the south by I-10 (possibly again with part of the boundary marked by other streets). That area is now divided mostly between a new HD 103 and HD 101; small pieces may be in HD 99 and the new HD 97. Most of the white part of old HD 97 has joined white population outside the beltline to form majority-white HD 101. The black part of old HD 97, most of which was in the southeast part of the district, has been matched with other majority-black neighborhoods by a narrow bridge, at one point only a narrow block wide, that snakes its way through Midtown Mobile to the north side of the in-town area. A small, majority-white neighborhood closer to downtown has ended up in the new HD 97.

All this racially motivated change affected SD 34 in two small ways: First, when the new HD 101 was nested in SD 34, it brought SD 34 a mostly white neighborhood in in-town Mobile with a racially crenelated boundary. The second racially drawn part of SD 34's perimeter is on the north side of the district's protrusion into Mobile. There, adjacent majority-black SD 33 takes a southward jag to rake in Mobile Terrace and Hillsdale Heights, two small majority-black pockets of Mobile's mostly white west-side suburbia.

The defendants offered no explanation, other than the community-of-interest evidence that we address and reject below, of the apparently race-based boundaries around the southeast edges of SD 34. As was the case in the Wiregrass and Montgomery, there is no serious incumbent-protection argument here. Mary Zoghby, the 1993 incumbent in the old "integrated" HD 97, testified credibly that I-65 was a natural dividing line between Midtown and suburban Mobile, and that the race-based division of Midtown was against her wishes.

While race thus determined the configuration of many of the Mobile County districts, SD 34 was on the edge of this racial engineering. It had to include some Midtown Mobile whites to further the creation of new HD 103, but those changes were modest in scope. The inclusion of Mobile Terrace and Hillsdale Heights in adjacent SD 33, moreover, was almost gratuitous under the global strategy because of their small population. Thus, while both these districts were affected by Dr. Reed's race-motivated districting, the effects were not significant enough to warrant strict scrutiny.

D. Nonracial Districting Criteria

1. Preserving Communities of Interest

The defendants sought to deflect the inference that race predominated in drawing many of the challenged districts by presenting testimony that all of the challenged districts were drawn to preserve the "communities defined by actual shared interests" that Miller identifies as a legitimate districting factor. *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 2488 (1995). The communities of interest varied from district to district and witness to witness. Senator Dixon, for example, considered his district, SD 25, to represent a community of interest because it was middle-class and probusiness. Senator Mitchell thought his district, SD 30, constituted a community of interest because much of it was rural, and all of the constituents were happy to see state money spent on building projects in their areas. The Reverend James Smith of Dothan sees communities of interest in SD 29's northern branches because he and other pastors may live in one county and preach in another, there are fraternal organizations that transcend county lines, and many people throughout the Wiregrass shop and seek health care in Dothan.

There are no doubt religious, class, and social communities of interest that cross county lines and whose protection might be a legitimate consideration in districting decisions. But the evidence in this case does not show that protecting communities of interest prevailed over race in the decision to put some people in one district and others in another. First, no evidence shows that Dr. Reed knew or cared about these communities of interest when

he drew the district lines. Second, these communities of interest are not ones that could guide a districter's hand, even if the districter were setting out to preserve them. Religious communities permeate the state; middle-class people live everywhere; there are social organizations and outlooks that are shared by citizens scattered from the Tennessee Valley to the Wiregrass. On the other hand, seeking to preserve *geographical* communities of interest could determine a proper line: such communities, for example, might include voters who enroll their students in the same school system that is seeking more state funding; commuters who use the same highway that is pitted with potholes or congested; or citizens whose air is polluted by a local plant, or who want the state to subsidize a new factory in their town through tax breaks. There is nothing here to suggest that this plan sought to preserve those kinds of communities of interest, and the widespread division of towns and neighborhoods on racial lines implies that Dr. Reed in fact ignored commonalities of schools, roads, and other civic services. We therefore find that protecting nonracial communities of interest was not an important objective in crafting the Plan's lines for any of the challenged districts.

2. Compactness

The parties offered objective measures and expert testimony about the absolute compactness of the challenged districts, and how they measure up against districts elsewhere. We reject this testimony. First, the reliability of the defendants' expert's testimony is undermined by its disagreement with common sense. While it may be true that some scholars have adopted objective

standards that deem meandering and contorted districts like SD 30 and HD 85 to be "compact," a glance and a grasp of the English language suffice to show that they are anything but. Second, even the plaintiffs' expert testimony was of limited usefulness. As the testimony implied, different regions will have different parameters of reasonable compactness: where crooked county lines, winding highways, and meandering rivers are the dominant "natural" boundaries in an area, a district whose compactness score is objectively reprehensible may in fact reflect an honest effort at compact districting. What is more relevant than comparison to districts in other regions, therefore, would be comparison to other districts that would be drawable in the relevant region to include similar geographical communities.

We have no such objective calculations in the record before us. The best we can do is apply an eyeball test to compare the Reed-Buskey Plan districts to other districting plans based on the same data. The only one we have in the record for senate districts is the Senate Committee Plan. Its senate districts are something of a hybrid between the 1983 Plan and the Reed-Buskey Plan: SD 21 follows pretty much the shape of the 1983 Plan; SDs 25 and 26 are rearranged as in the Reed-Buskey Plan, albeit with slightly different boundaries; SD 30 has its old configuration, except that it includes a small block of southwest Montgomery County; SD 29 is still just Henry, Houston, and Geneva Counties, but minus a piece of Henry County, which ended up in SD 28. SD 34 appears to have about the same configuration as it had under the 1983 Plan, although it is impossible to tell for sure on the small Senate Committee Plan map. These districts, apart

from SD 25, have fewer irregularities in their shape, and this suggests that a districter more concerned with compactness than race would have arrived at a different district configuration from what we see in the Reed-Buskey Plan. Certainly there is no superiority in compactness in the Reed-Buskey Plan to suggest that compactness was more important than race, whose fingerprints are everywhere.

We can reach a similar conclusion based on the only alternative house districting plan we have: the House Committee Plan, on which the house never voted. Our map is small-scale, and thus hard to read, but in the areas where the presently challenged districts are located,[29] there was not a lot of change between the 1983 Plan and this Plan. Southern Tuscaloosa County was still entirely within HD 62; HD 75 still occupied rural southern Montgomery County; and HD 86 continued to occupy central Houston County.

E. Compelling Interests

The defendants do not admit that the districts challenged here require strict scrutiny, and they have thus not

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[29] Elsewhere in the state, the House Committee Plan does not seem on our small-scale map to show much interest in contiguity, let alone compactness: HD 65, which under the 1983 Plan occupied all of Washington County and the southern two-thirds of Clarke County, was reshaped to include parts of western Washington and Choctaw. Counties along with what appears to be an island (or perhaps a barely contiguous piece of land) in central Clarke County.

explicitly advanced any countervailing compelling interest. *Cf. Miller*, 515 U.S. at 920, 115 S. Ct. at 2490. The Sinkfield defendants do, however, seek to justify the right of members of the ADC and similar organizations to achieve political power through racial gerrymandering. The only apparent relevance of this argument is as a possible compelling interest, and we treat it as such.

As it turns out, whether this associational interest is a compelling state interest is a question for another day, because for two reasons there is no record support for the argument. First, no evidence supports a conclusion that any other districting plan under consideration in 1993 would have violated the associational rights of ADC members, and thus that the *State* would have had a compelling interest to consent to the Reed-Buskey Plan to avoid violating those rights. Second, there is no way that the Plan could have been narrowly tailored to protect the associational rights of the ADC and similar organizations because Dr. Reed simply did not have the data he would have needed to protect those organizations; he was forced instead to use the overbroad proxy of race. We thus reject the defendants' apparent compelling-interest defense.

F. Remedies

As we announced from the bench, the court considers it too late, and the burden on the State too great, to direct that the State redistrict and conduct a special November 2000 legislative election in tandem with the presidential

and congressional elections.[30] The plaintiffs have asked in the alternative for a host of other remedies. Equitable remedies in this area must, as always, be tempered with a weighing of the relative burdens imposed, and they must as well focus on the constitutional violation that has been proven. *See Reynolds v. Sims*, 377 U.S. 533, 585, 84 S. Ct. 1362, 1393-94 (1964). Weighing the equities, and keeping in mind the narrow constitutional violation proven here, we grant some of the plaintiffs' requested remedies and deny others.

First, we agree with the plaintiffs that they are due an injunction against future use of the unconstitutional districts, even for special elections. No less a remedy will be effective, especially given Alabama's long-proven inability to redistrict itself in a timely fashion, and the risk that it will perpetuate the use of these unconstitutional districts. That said, the State has a legitimate interest in avoiding the expense of redistricting for a single special election in these districts, should one become necessary

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[30] Judge THOMPSON argues in dissent that this denial of relief renders the case moot. A claim is moot when a court "*cannot* grant 'any effectual relief whatever.' " *Calderon v. Moore*, 518 U.S. 149, 150, 116 S. Ct. 2066, 2067 (1996) (emphasis added) (quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S. Ct. 132, 133 (1895)). We have declined to order a special election not because one is *impossible* – it is obviously *possible*, at great expense to the State – but because the equities do not justify such relief in the circumstances. Judge THOMPSON cites no case holding that a court's refusal to grant requested relief moots a claim, and we would doubt that such a case exists. If it did, it would mean that any time a court denies injunctive relief, and the plaintiff does not seek damages, the claim would have to be dismissed for want of jurisdiction.

because of an unexpected vacancy. Therefore, in the event a special election should become necessary in any of the unconstitutional districts, the court will at that time hear from the parties, consider all the circumstances then existing, and determine the appropriate relief.

Second, we reject the plaintiffs' request that we enjoin the State from relying on the Reed-Buskey Plan as a baseline to measure retrogression under § 5 of the Voting Rights Act. While we share the plaintiffs' implicit doubt that any plan that is constitutional under *Shaw* could avoid retrogressing from the unconstitutional Reed-Buskey Plan, we reject this request for two reasons. The first reason is that the plaintiffs do not explain how so enjoining the *State* will prevent further harm from use of the unconstitutional districts. If the Southern redistricting battles of the 1990s have taught us anything, it is that the states covered by § 5 have little control over their districting decisions, even to the extent of being permitted to observe constitutional restrictions on districting.[31] Even if Alabama wished to (or was ordered to) avoid *Shaw* problems by using the 1983 Plan as a baseline, DOJ could disagree, deny preclearance, and pressure Alabama into adopting a plan that (relying on the Reed-Buskey Plan as a baseline) violates the Equal Protection Clause.

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[31] South Carolina is perhaps one of the best illustrations; the state's repeated efforts to redistrict itself were rejected by DOJ because even after *Shaw* issued DOJ would accept nothing less than a max-black "dream plan." The state finally surrendered and accepted the DOJ's plan, several districts of which were later declared unconstitutional racial gerrymanders. *See Smith v. Beasley*, 946 F. Supp. 1174, 1188-90 (D.S.C. 1996).

The second reason is that this proposed remedy would be overbroad, because we have found only a handful of majority-white districts to be unconstitutional. Retrogression analysis will concern majority-black districts, which we could not (lacking jurisdiction) have found to be unconstitutional. Preserving these districts could have ripple effects on the districts the plaintiffs live in, again perhaps rendering them unconstitutional gerrymanders in their own right. But that is getting into the realm of speculation, and the plaintiffs may of course seek relief under *Shaw* following the next redistricting.

Third, the plaintiffs ask us to establish a deadline for the State to enact a precleared plan, and if the deadline is not met, to draft our own interim plan. We think that this would be unnecessarily intrusive in the State's affairs. Because we will enjoin the State from future use of the unconstitutional districts in the Reed-Buskey Plan, the State must redistrict before 2002 to avoid running afoul of that order. If it appears at any point that the State is incapable of complying with that order, the court can take the matter up then.

Finally, the plaintiffs ask for their attorney fees. Having partially prevailed, they are entitled to some fee. *See Farrar v. Hobby*, 506 U.S. 103, 111-12, 113 S. Ct. 566, 573 (1992). We encourage the parties to agree to the amount of a reasonable fee in light of our rulings, and if necessary the court will take the matter up on motion.

IV. Conclusion

For the foregoing reasons, the court concludes that SDs 21, 25, 29, and 30 and HDs 63, 75, and 86 violate the

Equal Protection Clause. HD 89 and SD 34 do not. The court will enter judgment, consistent with this opinion, enjoining the State from conducting any legislative election, regular or special, in the unconstitutional districts without the prior approval of this court. The judgment will dismiss the claims challenging HD 89 and SD 34, as well as all districts for which summary judgment was granted, for want of jurisdiction.

Done at Montgomery, Alabama, this 24th day of April, 2000.

MYRON H. THOMPSON, District Judge, dissenting.

I.

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector v. McLaughlin*, 323 U.S. 101, 103, 65 S. Ct. 152, 153 (1944). Here we are presented with a case in which the avoidance of a constitutional question is not only possible, it is required by the standing doctrine applicable to racial gerrymandering, or *Shaw*, claims brought under the equal protection clause of the fourteenth amendment, as announced by the United States Supreme Court in *United States v. Hays*, 515 U.S. 737, 115 S. Ct. 2431 (1995). The posture of the *Hays* plaintiffs vis-a-vis the challenged districting scheme is identical to that of the plaintiffs now before us. The holding in *Hays* therefore controls this

case, and, rather than venture prematurely into difficult constitutional territory, we should do what the *Hays* Court did and dismiss the plaintiffs' claims for want of jurisdiction. Accordingly, I dissent.

Though an exhaustive retelling of the facts is unnecessary here, a brief enumeration of the factual similarities between this case and *Hays* demonstrates quite plainly that the law announced in *Hays* controls the case now before us. In both cases, the drawing of new statewide districting plans led to the creation of new districts whose populations were majority African-American. *See Hays*, 515 U.S. at 740, 115 S. Ct. at 2434. In both, the evidence demonstrates that the new majority-black districts were drawn primarily to increase representation for the black population in the State. *See id.* at 745, 115 S. Ct. at 2436. Indeed, no evidence in either case suggests that the racial composition of the neighboring majority-white districts was of any interest or import to the drafters. *See id.* at 746, 115 S. Ct. at 2437. Finally, the plaintiffs in both cases live not in the new majority-black districts, but rather in the neighboring districts that are majority white. *See id.* at 742, 115 S. Ct. at 2434.

In *Hays*, the Court began with the "now well settled" principle "that 'the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.' " 515

U.S. at 742-743, 115 S. Ct. at 2435 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 2136, 2137 (1992) (footnote, citations, and internal quotation marks omitted)). The Court continued, "The rule against generalized grievances applies with as much force in the equal protection context as in any other." *Id.* at 743, 115 S. Ct. at 2435. The *Hays* Court then held that the plaintiffs before it lacked standing because they met neither of two alternative showings: that they "live in the district that is the *primary focus* of their racial gerrymandering claim," or that they have "otherwise demonstrated that they, *personally*, have been subjected to a racial classification." *Id.* at 739, 115 S. Ct. at 2433 (emphasis added).

Which alternative showing a plaintiff desires to make is critical to whether the plaintiff has to make an additional factual showing of personal injury to establish standing. A plaintiff who resides in and is challenging the racially gerrymandered district that is the primary focus of the litigation is presumed to have suffered a personal injury in fact, *see id.* at 744-45, 115 S. Ct. at 2436, for such person "has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." *See id.* at 745, 115 S. Ct. at 2436. All other citizens in the State, including those who live in and are challenging neighboring districts, do not enjoy such a presumption, and must produce specific evidence that they have suffered personal and individualized harm resulting from the racial gerrymander, *see id.* at 745, 115 S. Ct. at 2436; this is because, unlike the in-district plaintiff who "may suffer the special representational harms racial classifications can cause in the voting context," such out-of-district

plaintiff "does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference. Unless such evidence is present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve." *See id.* at 745, 115 S. Ct. at 2436.

Hays's punch line, therefore, is that (1), if the plaintiff lives in and is challenging the district that is the primary focus of the racial gerrymander, he enjoys the personal injury presumption; but (2), if the plaintiff lives in and is challenging any other district in the State, he does not enjoy this presumption and must produce specific evidence that he has suffered personal and individualized harm resulting from the racial gerrymander.

Here, as I understand it, the plaintiffs contend that they have satisfied the first of the above alternative showings, and it is apparent that the majority understands the same because, according to the majority, "injury-in-fact is conclusively presumed" for the plaintiffs. *Ante* at 8. *Hays*, therefore, dictates that we first determine exactly which districts are the "primary focus" of the plaintiffs' racial gerrymandering claims. Until we know which districts are the "primary focus" of the plaintiffs' *Shaw* claims and unless the plaintiffs actually reside in these districts, we should not address their claims.

According to the majority, this case and *Hays* differ fundamentally in that the *Hays* plaintiffs challenged the majority-black districts in which they did not reside, while the plaintiffs in the current case challenge only the

districts of which they are residents. It reaches this conclusion by comparing the Supreme Court decision in *Hays* to the language of the plaintiffs' complaint here, which attempts to drive a narrow but critical wedge between the posture of the plaintiffs in this case and in *Hays*. Here, essentially, is where I part company with the majority. Rather than relying purely on the plaintiffs' framing of their claims in determining whether they have standing, we should look behind their semantics and focus on the substance of their equal-protection claims.

First, the Supreme Court's approach to identifying the target of the plaintiffs' challenge in *Hays* provides no support for the pleading method the majority now advocates. The majority writes that this "look to the complaint" approach, *ante*, at 4, "sav[es] us from floundering in the vagueness of the infinitely manipulable term 'primary focus.' " *Id.* The majority then explains: "[W]e read *Hays* in its simplest terms, arbitrary as that may seem to academia: a *Shaw* plaintiff can satisfy the first element of Article III standing, injury-in-fact, by showing (1) that he lives in the district he challenges and (2) that the district is 'racially gerrymandered.' " *Id.* at 5.

But, simply put, the majority's complaint approach is directly belied by *Hays*'s holding. Had the *Hays* Court focused on the plaintiffs' complaint, which, as even the majority admits, was framed as an attack on the statewide districting scheme as a whole and thus on the district in which the plaintiffs lived, and had the Court intended that facial allegations would be sufficient, the Court would have then proceeded to address the constitutional question of the moment – whether the district was racially gerrymandered. But the Court did not, and

the critical question is, Why not? The *Hays* Court did not because, rather than relying on the allegations in the complaint, it sought first to determine what the "primary focus" of the litigation was, *Hays*, 515 U.S. at 739, 115 S. Ct. at 2433, and, after determining that that focus was not on the district that plaintiffs were challenging, it then sought to determine whether the plaintiffs had demonstrated personal and individualized injury. *See id.* The fact that the *Hays* plaintiffs characterized their claim as a challenge to all the districts (and thus their own district) did not carry the day. The district that a plaintiff claims to be 'challenging' is not necessarily the district that is the 'primary focus' of the litigation (as, indeed, the *Hays* Court found in the case before it), for a determination of the latter demands a factual and detailed inquiry by the court into the evidentiary record. A plaintiff has standing when the district claimed to be challenged by the plaintiff *and* the primary focus district (as found by the court from its own independent review of the evidence) end up being the same district, because in such instance the plaintiff would be presumed to have suffered an injury in fact. If a plaintiff *says* that he is challenging one district but the evidence reveals that the *primary focus* of his challenge is on another district, then the plaintiff would lack standing to pursue that challenge unless he meets *Hays*'s alternative showing requirement of an individualized harm, because in such instance there would be no presumption of an injury in fact.

In my view, the majority goes astray because it fails to recognize this important difference, for by simply looking at the districts the plaintiffs here say they are challenging and allowing them the benefit of the injury-in-

fact presumption, without making the additional determination that these districts are also the primary focus of their claims, the majority improperly allows the plaintiffs to enjoy the presumption, when in such instances, according to *Hays*, there should be no injury presumption and the plaintiffs should be required to make an individualized showing of harm. In other words, by allowing residents of districts, that the court has not found to be the primary focus of the racial gerrymander, the benefit of the personal injury-in-fact presumption, the majority improperly conflates, and confuses, the ways the *Hays* Court articulated that *Shaw* claim standing can be established.

"Vague" or "infinitely manipulable," the primary-focus approach is the approach that the Supreme Court has directed that we use in instances such as this where the plaintiffs seek to satisfy the first of *Hays*'s alternative methods of showing *Shaw* claim standing and enjoy the injury-in-fact presumption. And "floundering" or not, we must follow that directive and undertake the task. We cannot be "saved" from it; we cannot avoid it.[1]

Second, even in the absence of this express directive from *Hays*, general and well-established standing law would command that we make some factual inquiry,

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[1] The majority says that this case is "apparently unique among the *Shaw* cases in that we have white plaintiffs challenging majority-white districts that are next door to engineered minority 'safe seats.' " *Ante* at 5. This case is not unique. *Hays* involved plaintiffs, at least one of whom was white, "challenging majority-white districts that are next door to engineered minority 'safe seats,' " and the Supreme Court simply said they all lacked standing.

either whether the challenged district is the primary focus of the racial gerrymander if the plaintiff seeks to enjoy the personal injury presumption or whether the plaintiff has suffered individualized, personal injury in all other instances. "It is a long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings,' but rather 'must affirmatively appear in the record.' " *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 608 (1990) (quoting *Grace v. American Central Ins. Co.*, 109 U.S. 278, 284, 3 S. Ct. 207, 210 (1883) and *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 511 (1884)); *see also Hays*, 515 U.S. at 743, 115 S. Ct. at 2435 ("We have also made clear that 'it is the burden of the "party who seeks the exercise of jurisdiction in his favor," *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 785, 80 L. Ed. 1135 (1936), "clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Warth v. Seldin*, 422 U.S. 490, 518, [95 S. Ct. 2197, 2215, 45 L. Ed.2d 343] (1975).' *FW/PBS, supra*, at 231, 110 S. Ct., at 607-608. And when a case has proceeded to final judgment after a trial, as this case has, 'those facts (if controverted) must be "supported adequately by the evidence adduced at trial" ' to avoid dismissal on standing grounds. *Lujan, supra*, at 561, 112 S. Ct., at 2137 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115, n.31, 99 S. Ct. 1601, 1616, n.31, 60 L. Ed. 2d 66 (1979)).").

Thus, the plaintiffs' bald conclusions that they are challenging their own districts or that they have standing to sue do not automatically create jurisdiction, but rather must be supported by evidence in the record. Likewise, this court must examine the evidence supporting the

plaintiffs' assertions and assess its adequacy, rather than taking the allegations purely at face value.

The majority attempts to support its pleadings approach through cursory, and I believe misplaced, references to two of the Federal Rules of Civil Procedure. These rules, it asserts, require the court to consider the plaintiffs' complaint at face value, and preclude any closer look into the standing issue. First the majority cites Rule 8(a), which requires that every plaintiff include in his complaint a statement of the basis for federal court jurisdiction, a statement of the grounds upon which relief may be granted, and a demand for relief. The purpose of this rule is to reduce the burden on plaintiffs to define their claims with unreasonable specificity and technical precision. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 48, 78 S. Ct. 99, 102 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.") The majority also references Rule 16(e), which limits the issues in a case to those delineated in the pretrial order. If there were a pretrial order in this case, Rule 16(e) would require the court to consider only those issues set forth in such order. However, it is quite a stretch to infer from these two rules that the court is limited in its standing analysis to allegations in pleadings. And, in any event, these rules do not, and cannot, overrule Supreme Court constitutional precedent.

In the case before us, as in *Hays*, this deeper inquiry into the evidence behind the plaintiffs' claims reveals that their primary focus is to attack the majority-black districts that neighbor their own, rather than to challenge

only their own districts or to vindicate their own right to equal protection of the laws. The plaintiffs have failed to produce even a shred of evidence demonstrating that the drafters of the current legislative districting plan formed an independent intent to place whites in their districts or consciously created white-majority districts to achieve personal or political ends. Nor have they provided any specific evidence suggesting that they personally were placed in their districts because of race. Rather, the plaintiffs' objection is to the deliberate creation of majority-black districts for the purpose of increasing black voting power in Alabama. The creation of these majority-black districts necessarily caused the neighboring districts to change shape, admittedly quite substantially at times, and resulting in rather irregular boundaries. Nonetheless, the only sense in which the plaintiffs object to the way their own districts were drawn is insofar as their districts represent the negative space out of which the objectionable majority-black districts were carved.

The evidence presented in support of each plaintiff's claims strengthens this conclusion. Plaintiff Ricardo Montiel's objections to SD 21 focus on the portions of Tuscaloosa County included in neighboring majority-black SD 24 and therefore necessarily left out of his own district. His objections to the shape of HD 63 focus on the same portions of Tuscaloosa, which were placed in majority-black HD 70 rather than in his own district. Plaintiffs Daniel Brown and Genae Spinks, who reside in SD 25, object to their own district only to the extent that it was shaped by the race-conscious drawing of neighboring SD 26. Spinks's challenge to HD 75 primarily alleges that her district should have included areas that were instead

placed in HD 76 for racial reasons. Plaintiffs Peggy Kelley and Karen Outlaw purport to object to SD 30, but the focus of their claim is the racially-motivated drawing of SD 23 in Lowndes County, and of SD 29 in Dale County. While nominally objecting to HD 89 and HD 86, plaintiffs Karen Outlaw and Bibb Gunter complain primarily of how the shape of their districts was dictated by the drawing of neighboring majority-black HD 85. Finally, plaintiff Gonzalo Montiel's only objection to his SD 34 is that portions of Mobile County that he thought should have been in his district were instead placed in SD 33 to bolster the black majority there.

Perhaps the one exception to this pattern of objecting primarily to the shape of the neighboring majority-black districts, rather than to any race-conscious motive in the drawing of their own districts, is plaintiff Bibb Gunter's claim with respect to SD 29. Rather than complaining primarily of a different district next door to his own, Gunter's complaint, though framed as a challenge to his senate district, is really an attack on one of the house districts nested in his senate district, but in which he does not live. Gunter raises no objection to the way SD 29 as a whole was drawn. Instead, he complains exclusively of the formation of HD 85, which forms part of SD 29 only because HD 85 happens to be nested with HD 86 and HD 87. Though framed slightly differently from the other plaintiffs' claims, the result is the same. At base, Gunter is a non-resident of the district that forms the primary focus of his racial gerrymandering claim.

Finally, that the primary focus of this litigation is the majority-black districts is revealed by the very words the majority uses to explain and examine the plaintiffs'

claims. The majority admits that the majority-black districts are the "targeted districts" of the alleged racial gerrymander, and the plaintiffs' districts are the "next door districts." *Ante* at 14, passim. It admits that the purpose of the state-wide redistricting plan was to create safe majority-*black*, and not safe majority-*white*, districts. *See ante* at 21-24.

Nevertheless, the majority attempts to get around the fact that the primary focus of this litigation is on the majority-black districts by arguing that "next door districts are not necessarily just leftovers." *Ante* at 14. The majority explains: "The act of segregation, not racial composition alone, inflicts the constitutional harm. . . . The drawing of lines does not happen to a single equal-population district in isolation. A line drawn to achieve a certain racial composition in target district *X* also outlines next-door district *Y*; the placement of certain population in district *X* rather than district *Y* leads *Y* to look elsewhere for people; and so on in a series of ripple effects that diminish as you move away from the target district. These ripple effects may in the end not be racial. But close enough to 'ground zero' there may be enough race-tainted ripple effects (for instance, the division of a neighborhood along racial lines that leave whites in the next-door district and blacks in the target district) that we can fairly say that race predominated in the district's peopling." *Ante* at 15.

This argument boils down to the contention (and a superficially attractive one at that I must admit) that you cannot segregate on one side of the line without segregating on other side – that is, you cannot segregate blacks into majority-black districts without segregating whites

into neighboring districts. Or, to put it more figuratively, you cannot separate the goats from the sheep without separating the sheep from the goats as well.

But, for two reasons, this approach to standing in *Shaw* cases is inappropriate in light of *Hays*. First, this approach is not the approach imposed in *Hays*, and, second, *Hays* expressly rejects it. In *Hays*, the Supreme Court sought to draw a legal bright line between those who live in and are challenging the district that is the primary focus or target of the racial gerrymander (and who thus enjoy an injury-in-fact presumption) and all others in the State who do not live in and are not challenging that district (and who thus must demonstrate personal, individualized harm). It is therefore true that "next door districts are not necessarily just leftovers," *ante* at 14, but rather, for these districts' residents to establish standing, they must present specific evidence of personal harm resulting from the racial gerrymander.

Moreover, with regard to the latter group, and in particular those who live in a neighboring district (as the plaintiffs do here), the Supreme Court expressly rejected the segregation or neighboring-district or ripple-effect argument now advanced by the majority. The Court wrote:

> "Appellees urge that District 5 [the next-door district] is a 'segregated' voting district, and thus that their position is no different from that of a student in a segregated school district. But even assuming, arguendo, that the evidence in this litigation is enough to state a *Shaw* claim with respect to District 4, that does not prove anything about the legislature's intentions with

> respect to District 5, nor does the record appear to reflect that the legislature intended District 5 to have any particular racial composition. Of course, it may be true that the racial composition of District 5 would have been different if the legislature had drawn District 4 in another way. But an allegation to that effect does not allege a cognizable injury under the Fourteenth Amendment. We have never held that the racial composition of a particular voting district, without more, can violate the Constitution."

Hays, 515 U.S. at 746, 115 S. Ct. at 2436-2437 (citations omitted). Many arguments can be made to explain why the Court said what it said. For example, when the litigation reveals that the "primary focus" of the legislative plan is the intentional creation of majority-black districts, and not the incidental creation of neighboring white districts, the residents from the majority-black districts should be the only ones to benefit from the injury-in-fact presumption, for they are the ones who are the true objects of the alleged unconstitutional acts; those living in the neighboring district should have to make the personal, individualized showing of injury. *See Hays*, 515 U.S. at 745, 115 S. Ct. at 2436 (Voters in districts that are the target of the racial gerrymander "may suffer the special representational harms racial classifications can cause in the voting context. On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference. Unless such evidence is

present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve."). In contrast with the Supreme Court's effort to rein in standing in *Shaw* cases, the majority's approach would open up standing to voters all across the state, or, at least, to voters all across the state claiming standing, without having to show, at a minimum, any personal and individualized injury.

But such arguments, I admit, are all beside the point. As stated, the Supreme Court in *Hays* rejected the majority's segregation or neighboring-district or ripple-effect argument. And moreover, in the *Shaw* cases since *Hays* where the plaintiffs have not sought to show personal injury, the plaintiffs, as the majority acknowledges, "resided in the majority-black or majority-Hispanic district that was the target and goal of the racial gerrymander." *Ante* at 13-14 . In *Bush v. Vera*, 517 U.S. 952, 957-958, 116 S. Ct. 1941, 1951 (1996), the Court applied *Hays* and held that the plaintiffs had standing because they lived in the targeted districts of the racial gerrymander. And, more to the point, if not on point, in *Shaw v. Hunt*, 517 U.S. 899, 904, 116 S. Ct. 1894, 1900 (1996), in applying *Hays* again, the Court held that the plaintiffs who lived in the targeted districts of the racial gerrymander had standing, and those who did not live in those districts lacked standing.

To be sure as previously stated, according to *Hays*, even plaintiffs who live outside the district that is the primary focus of the litigation could have standing if "they have . . . otherwise demonstrated that they, personally, have been subjected to a racial classification." 515 U.S. at 739, 115 S. Ct. at 2433. But here, the plaintiffs have

not established such injury, and the majority does not even maintain that they have.

II.

Because the record in this case, even as summed up by the majority in its opinion, reflects that the "primary focus" of this litigation is the targeted, safe majority-black districts, and because the plaintiffs here do not reside in those districts and have not otherwise established personal and individualized injury resulting from the alleged racial gerrymander, this case should be dismissed. Nevertheless, there are other compelling reasons why this court should not reach the merits of this case and should instead dismiss it.

The only relief afforded by the majority is that the plaintiffs "are due an injunction against future use of unconstitutional districts, even for special elections." *Ante* at 54.[2] And this relief is further qualified with the statement that, because "the State has a legitimate interest in avoiding the expense of redistricting for a single special election in these districts, should one become necessary because of an expected vacancy," *id.*, the court will not necessarily order a new redistricting plan. The

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[2] In the final judgment and injunction the court enters today, the *only* relief ordered is that, "The defendant James Bennett, as Secretary of the State of Alabama, and his successors in office are ENJOINED from conducting any election for a representative to the Alabama House of Representatives from House Districts 63, 75, or 86, and from conducting any election for a senator of the Alabama Senate from Senate Districts 21, 25, 29, or 30, without the prior approval of this court."

majority explains: "[I]n the event a special election should become necessary in any of the unconstitutional districts, the court will at that time hear from the parties, consider all the circumstances then existing, and determine the appropriate relief." *Id.*

What the majority gives here is no substantive relief at all. First of all, the State of Alabama is already under a constitutional obligation to redistrict its legislature based on the 2000 census. *See Reynolds v. Sims*, 377 U.S. 533, 568, 584, 84 S. Ct. 1362, 1385, 1393 (1964) (holding that the equal protection clause requires States to draw their legislative districts based on population data, and that the use of data more than ten years old for such purposes is "constitutionally suspect."); Ala. Const. 1901, §§ 198-200 (providing that the state legislature will redraw election districts in the next session after the taking of each decennial census). To say that the State cannot, in the next regular elections, use the seven districts found by the court to be unconstitutional is mere surplusage. And for the court to speculate that the State may not redistrict itself in time for the 2002 elections is just that – speculation; and, in any event, any failure by the State to meet its redistricting obligations should be addressed by another court convened after the fact and presented with concrete facts – in other words, a court actually confronted with a "case or controversy" in which a plaintiff alleges a current failure to redistrict.

Second, it is most unlikely that there will be a vacancy warranting a special election in one or more of these seven districts between now and when the legislature redistricts itself before 2002, and it is most unlikely that, even if a vacancy occurs, this court would order

redistricting, a remedy that would surely necessitate special elections, first, for not only the vacant district but all surrounding districts that would be affected by the redistricting, and, second, within a year or so before regular statewide redistricting. The special-election relief ordered by the majority is based on an unlikely possibility based on another unlikely possibility, the first unlikely possibility being that there will be a vacancy in one of these districts in the very short time left in the present election cycle, and the second one being that, even if such a vacancy occurred, a court would order the State to engage in the redistricting of several districts just before it is going to have to engage in state-wide redistricting anyway.

Moreover, the injury essentially identified by the majority in the relief ordered – no future elections under the plan – is a curious injury. The majority's prohibition on future elections suggests that it has in mind an *injury that occurs on election day*. But, if these districts are really racially gerrymandered the injury is ongoing and persists as long as the districts remain in place, regardless as to whether there are vacancies and regardless as to whether the current officeholders represent the districts or different persons do so as a result of vacancies.

Whether the issue is viewed as one of mootness (no effective remedy is available at this time) or issue preclusion (the decision of the Alabama Supreme Court in a parallel case, that *Shaw* challenges to districts in the current legislative redistricting scheme are moot, precludes

relitigation of such challenges here),[3] the bottom line is that the Alabama Supreme Court was right in rejecting a similar challenge to the districting plan now before us: the current redistricting plan is too near the end of its life to afford any effective substantive relief. *See Rice v. Sinkfield*, 732 So.2d 993 (Ala. 1998).[4] And the empty relief ordered by the court today dramatically demonstrates the

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[3] The majority curiously states, on the one hand, that the Alabama Supreme Court's mootness holding is not preclusive because that court did not consider that the "Reed-Buskey Plan may . . . serve as the starting point for the next reapportionment," *ante* at 13 , and the court then holds, on the other hand, that relief based on the plan serving as a baseline measure in the upcoming redistricting would be too speculative. *See id.* at 54. If the relief that would address this concern is too speculative, then the concern should not serve as a basis for rejecting the Alabama Supreme Court's decision as preclusive.

[4] In *Rice v. Sinkfield*, the Alabama Supreme Court wrote:

> "By that time, the report of the 2000 federal census is scheduled to be released, and we must assume that the Legislature will timely fulfill its constitutional duty to redraw legislative districts based on that census. Thus, we must conclude that the elections held in 2002 and subsequent years will be governed not by the current consent judgment, but by a new districting plan that is based on the 2000 federal census. Because we must assume that any potential modification of the current consent judgment based on the 1990 census would not affect the outcome of the 2002 legislative election or any successive legislative election, we must conclude that an effort by this Court to render the relief sought by the plaintiffs would not be effective."

732 So.2d at 993-994 (citations omitted).

unassailability of that conclusion.[5] One day, one month, and even one year, after the court enters its final order today, the status quo will remain; nothing will have changed. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478, 110 S. Ct. 1249, 1253 (1990) ("Article III . . . confines [federal courts] to resolving ' "real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character." ') (quoting *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241, 57 S. Ct. 461, 464 (1937)); *Colegrove v. Green*, 328 U.S. 549, 565, 66 S. Ct. 1198, 1208-1209 (1946) (Rutledge, J., concurring) (dismissal of complaint by trial court should be affirmed because, "The shortness of the time remaining (before forthcoming elections) makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek.").[6]

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[5] The refusal to give effective relief based on the exercise of discretion can also render a case moot.

[6] The majority questions whether "a court's refusal to grant requested relief moots a claim." *Ante* at 53 n.30. The majority notes that it "declined to order a special election not because one is *impossible* – it is obviously *possible*, at great expense to the State – but because the equities do not justify such relief in the circumstances." *Id.* If I correctly understand the issue, the majority seems to be saying that mootness would occur only when the relief is impossible, not just when it is imprudent or impractical. I have two responses. First, I think this very restricted understanding of mootness would come as a surprise to most legal scholars. Relief need not be impossible for an issue to be moot. *See* 13A Charles A. Wright, A. R. Miller, & E. H. Cooper, Federal Practice and Procedure, § 3533.3 at 276 (for an issue to be moot, "the futility or impossibility of effective relief need not be certain"); *see also id.* at 275-276 n.29 (citing and discussing cases finding mootness based on "remedial

The relief here is non-substantive only – that is, it does not address the substance of claims presented.

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unwillingness," not impossibility). Nor is it necessarily problematic that the refusal to afford relief is based on discretion. *See id.*, § 3533.1 at 214-215 (One of the "three doctrinal foundations" upon which "[m]ootness principles rest" is that "Remedial discretion is often relied upon to determine that the prospective benefit of an injunction, declaratory judgment, or other specific remedy is too slight to justify decision."); *id.*, § 3533.3 at 261 ("[L]ittle is gained by struggling with the distinctions between the mootness that arises from Article III and that which results from remedial discretion."); *see also id.* at 275-276 n.29 (citing and discussing cases finding mootness based on the exercise of remedial discrimination). Indeed, in *Rice v. Sinkfield*, 732 So.2d 993 (Ala. 1999), the Alabama Supreme Court could have, after addressing the merits of the *Shaw* claims, ordered redistricting; it was not 'impossible' in an absolute sense. Instead, the court essentially found that such relief was impractical and imprudent and dismissed the appeal as moot.

Second, it is not so "obvious" that special elections would at this stage be possible before the next scheduled election, even without regard to the financial and political burdens they would impose upon the State and individual legislators. Several state officials, including Senators Dixon and Mitchell and Secretary of State Bennett testified about the length and difficulty of the districting process, thereby calling into question whether the redrawing of district lines and the administration of special elections would be physically possible before campaigns begin for the 2002 elections. Even more troubling, however, is the fact that the only census data currently available to the legislature and the court for the purpose of redistricting is now fully ten years old. To draw new districts based on such stale population data would not be merely unadvisable based on "the equities," it would likely be unconstitutional. *See Reynolds v. Sims*, 377 U.S. 533, 568, 584, 84 S. Ct. 1362, 1385, 1393 (1964) (holding that the equal protection clause requires States to draw their legislative districts based on population data, and that the use of data more

When all is said and done, the reality here is that all the plaintiffs will get from this court and from this litigation is their attorneys' fees and expenses from the defendants.

* * *

In conclusion, the redistricting plan before this court, the Reed-Buskey Plan, presents serious questions as to whether some of its majority-black districts are racially gerrymandered in violation of the fourteenth amendment. But for two reasons this case is not the one in which those questions should be answered, and thus it should be dismissed. First, *Hays* dictates that these plaintiffs are simply not the ones who can pursue the questions in court; and, second, even if they were, because these questions are presented so late, we cannot give

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than ten years old for such purposes is "constitutionally suspect."). The majority does not make clear how it determines whether a remedy is "possible," but surely it would agree that an unconstitutional remedy is squarely within the realm of the impossible.

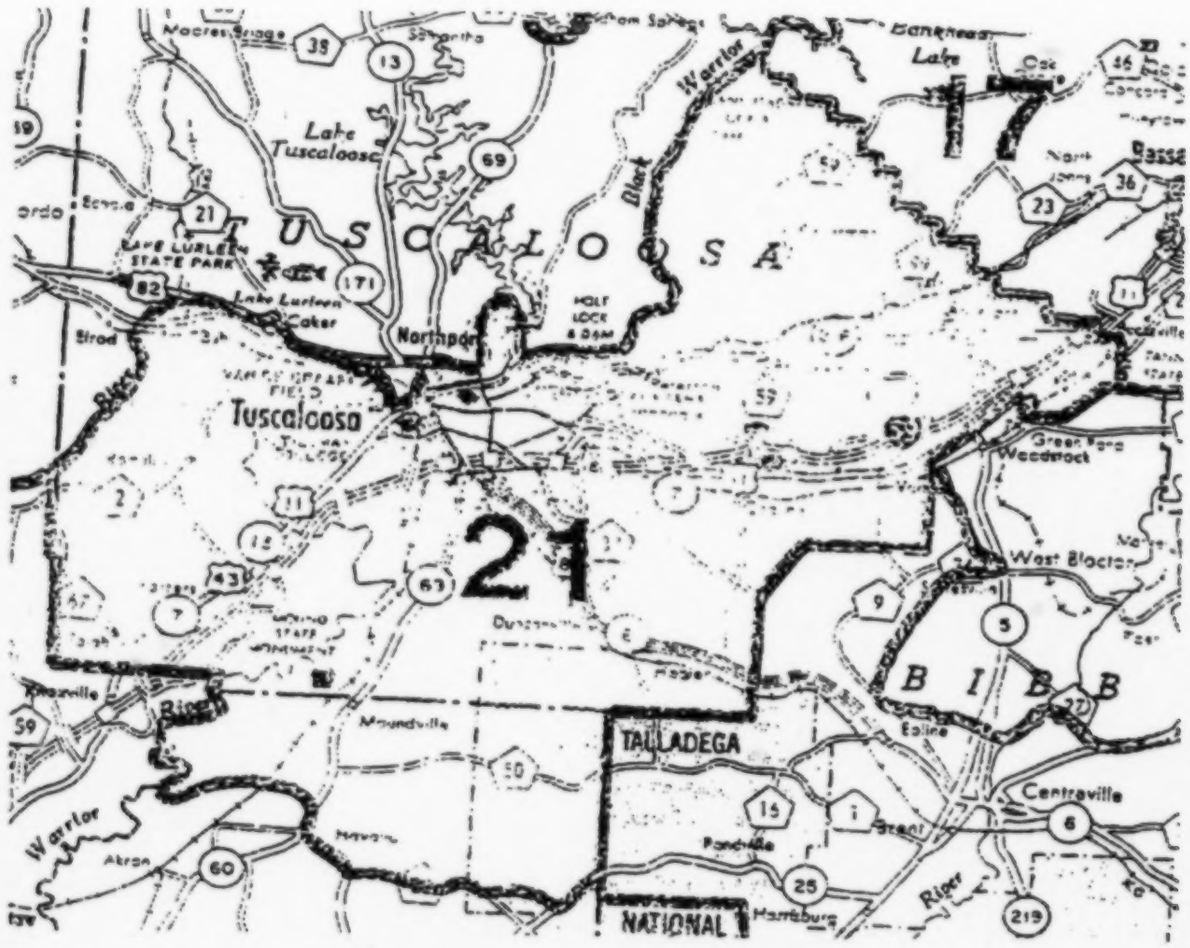
The majority also seems to question whether it is appropriate to dismiss a case as moot after the case has been heard on the merits. Again, I have two responses. First, the defendants have pressed their mootness argument from the beginning of this aspect of this litigation. The issue is being addressed now only because we have waited until now to address it. Second, and perhaps more importantly, the "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, 110 S. Ct. 1249, 1253 (1990). That the plaintiffs' claims may have become moot after hearing all the evidence is of no consequence here.

effective relief.[7] Should the current majority-black districts, in whole or in part, survive the upcoming redistricting by the State for the 2002 elections, the issue of whether those districts are constitutional should be for another court to decide in another case presented by residents of those districts.

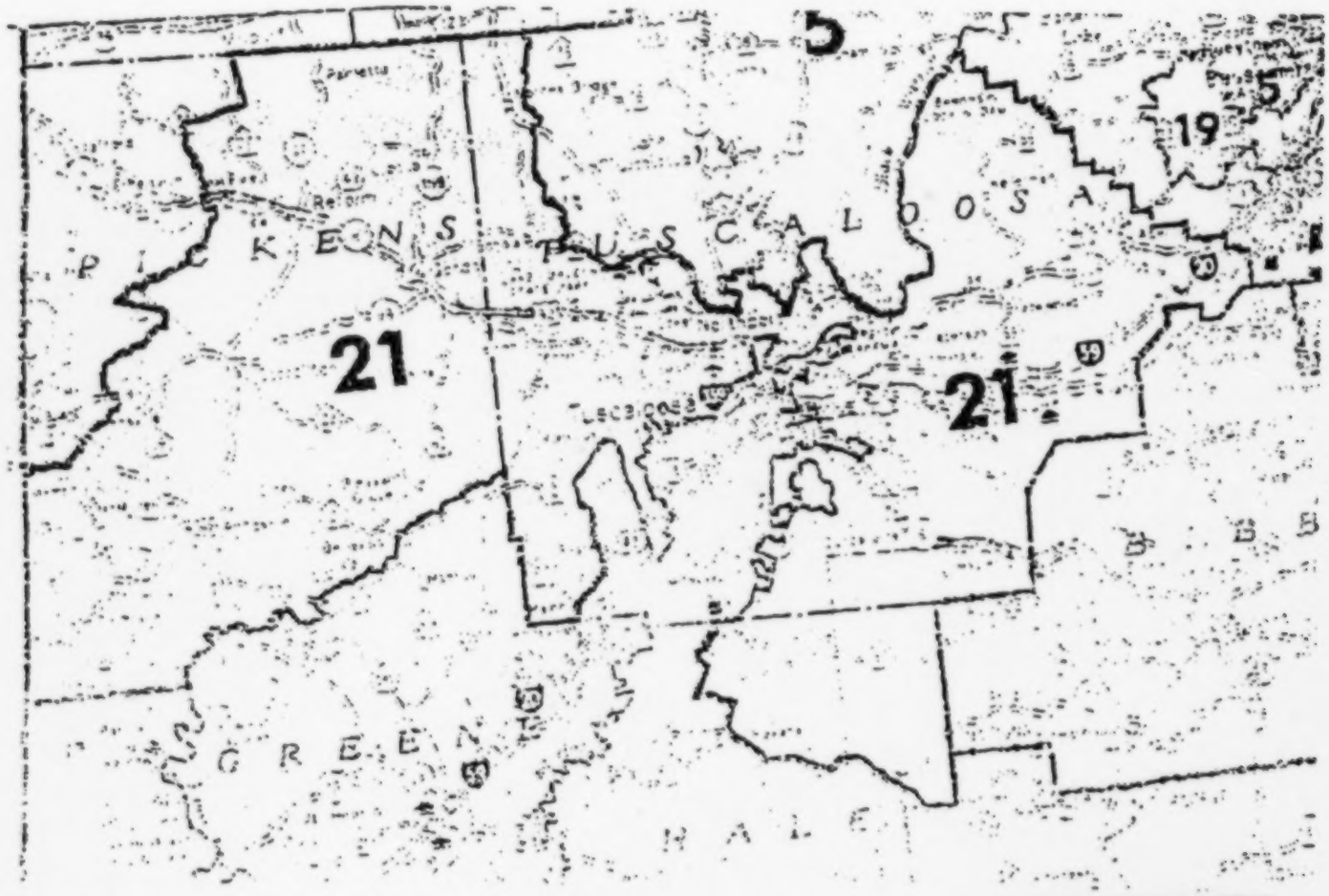
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[7] I must admit that in some earlier orders I agreed to the dismissal of some of the plaintiffs' claims on the merits. This was in error. These claims should have been dismissed on standing or mootness grounds.

"OLD" SENATE DISTRICT 21



REED-BUSKEY SENATE DISTRICT 21



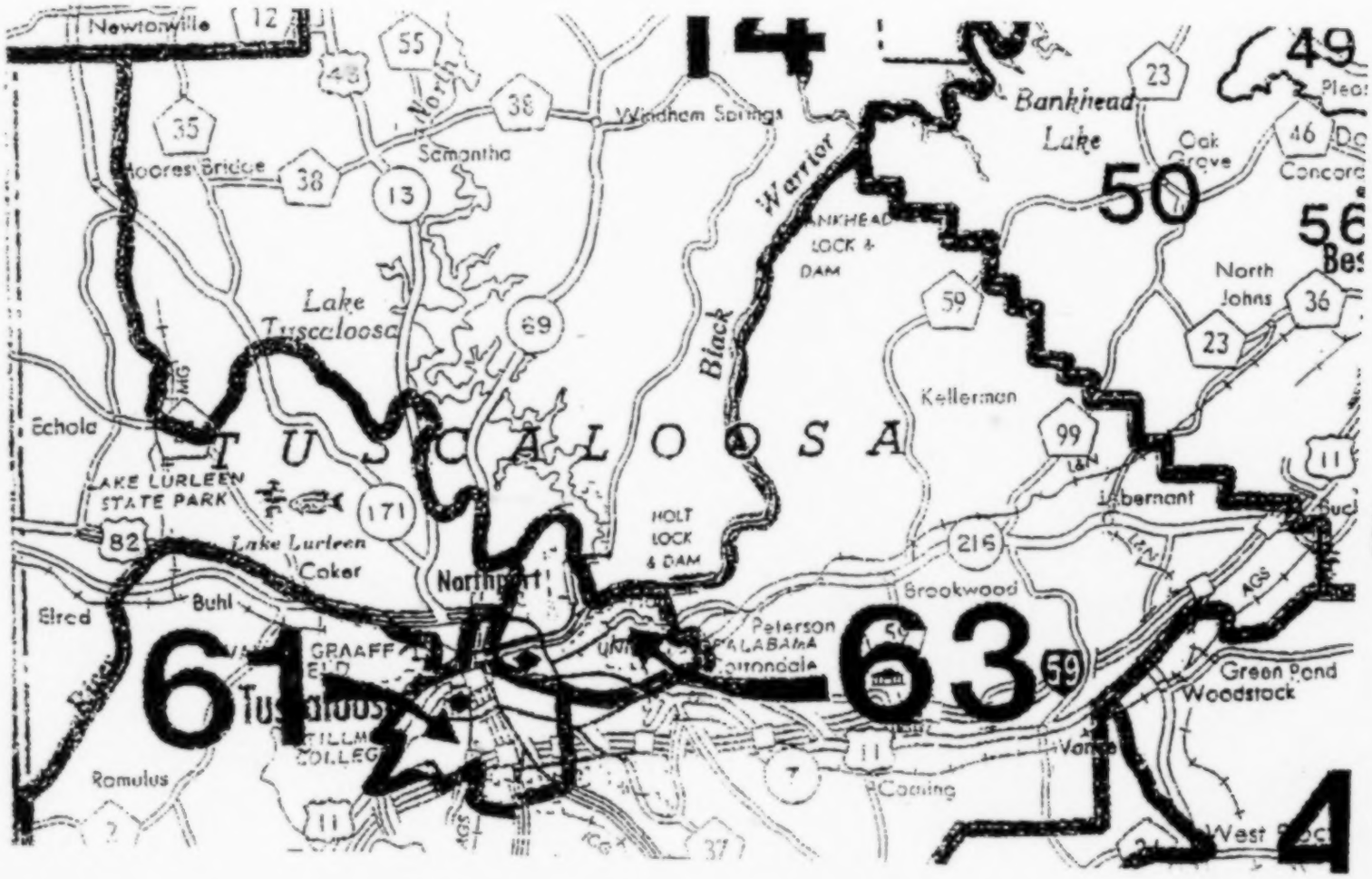
APPENDIX "A"

PLAINTIFF'S EXHIBIT 356

77a

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"OLD" HOUSE DISTRICT 63



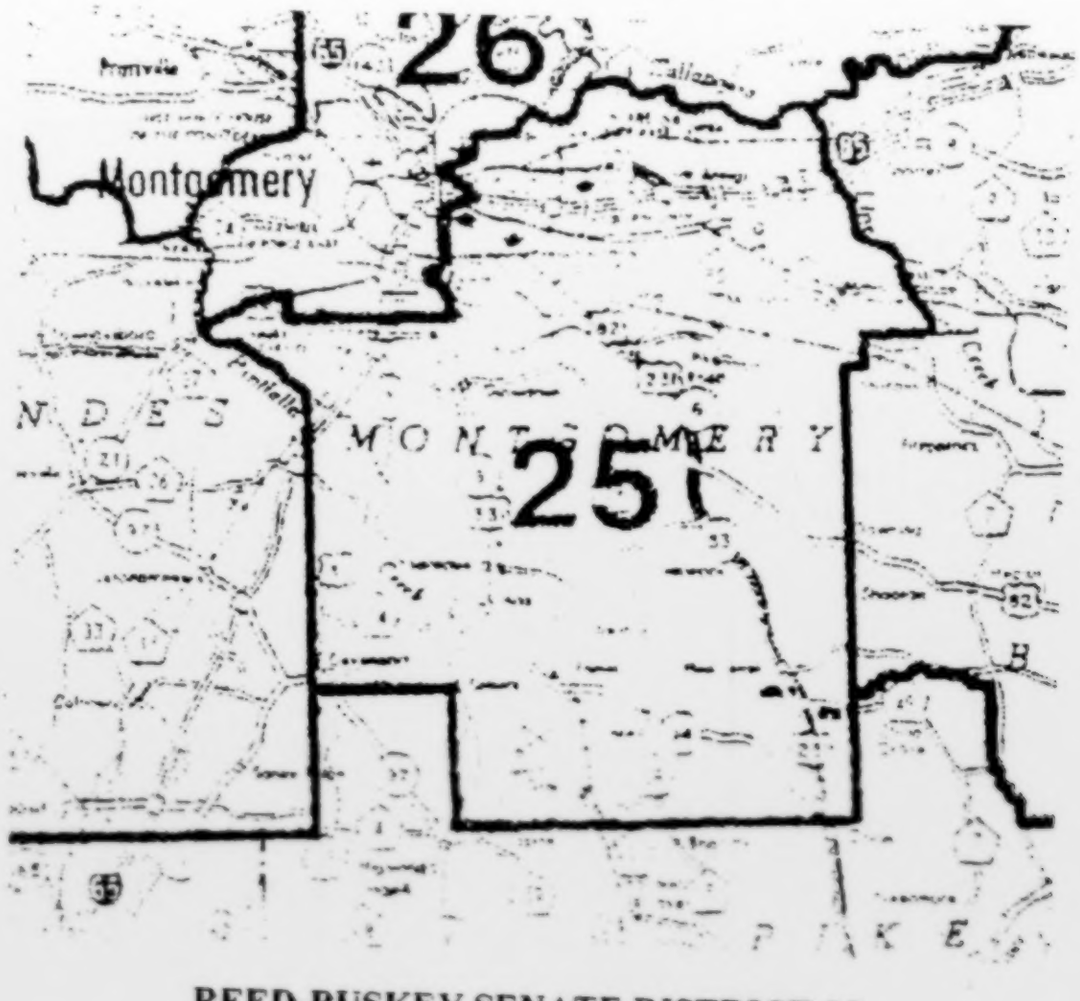
78a

REED-BUSKEY HOUSE DISTRICT 63

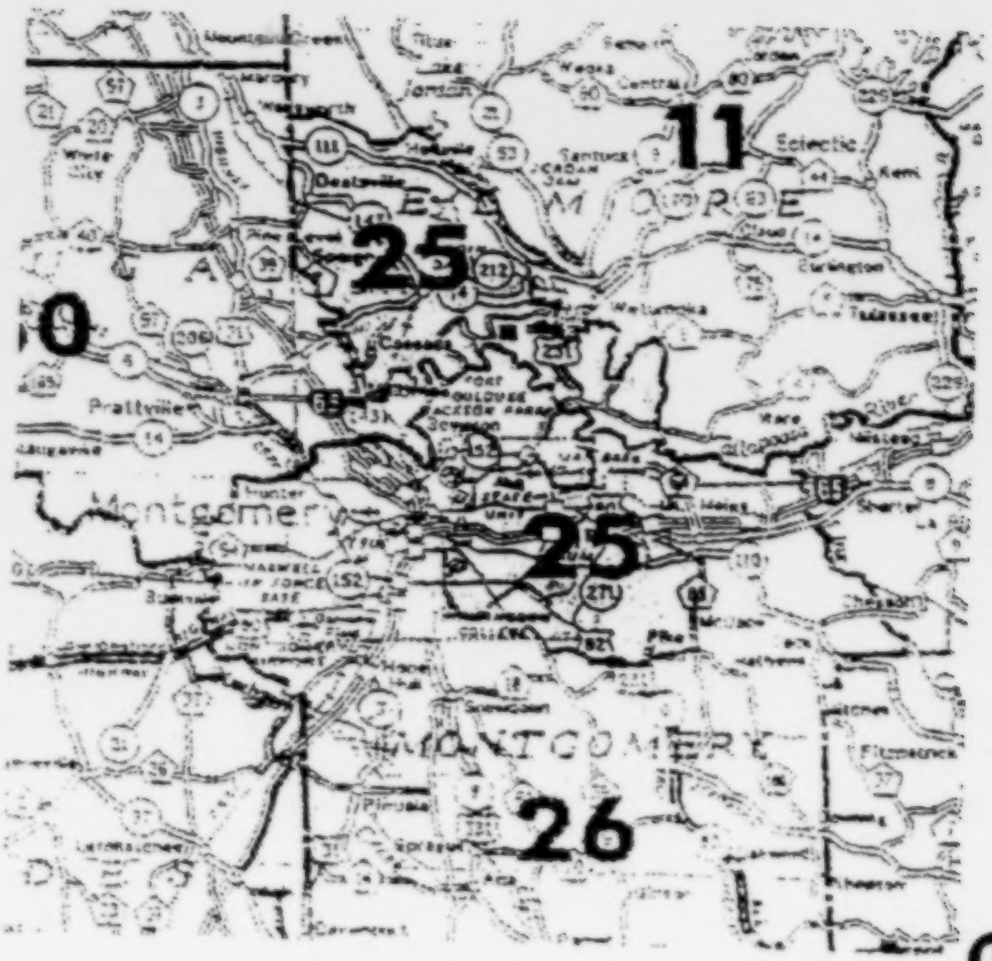


PLAINTIFF'S EXHIBIT 361

"OLD" SENATE DISTRICT 25

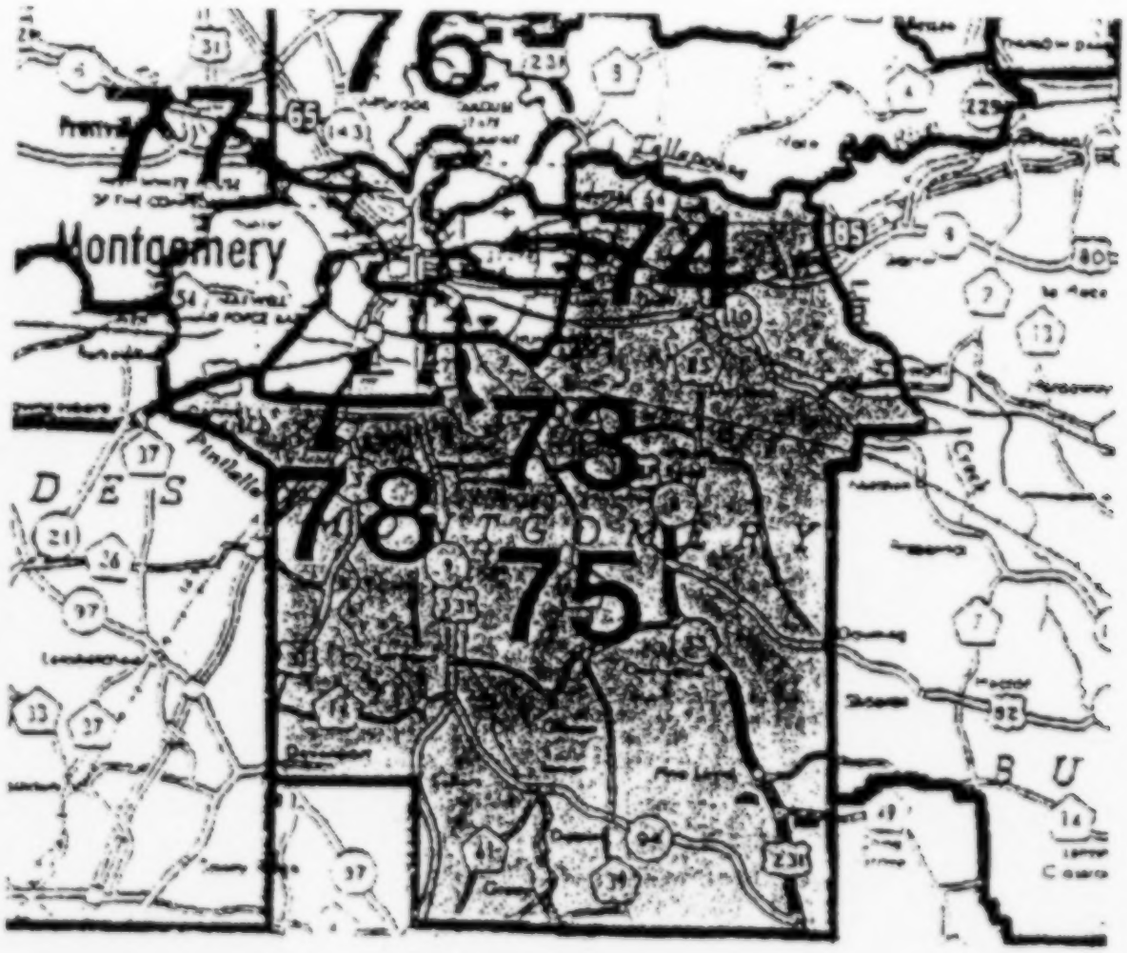


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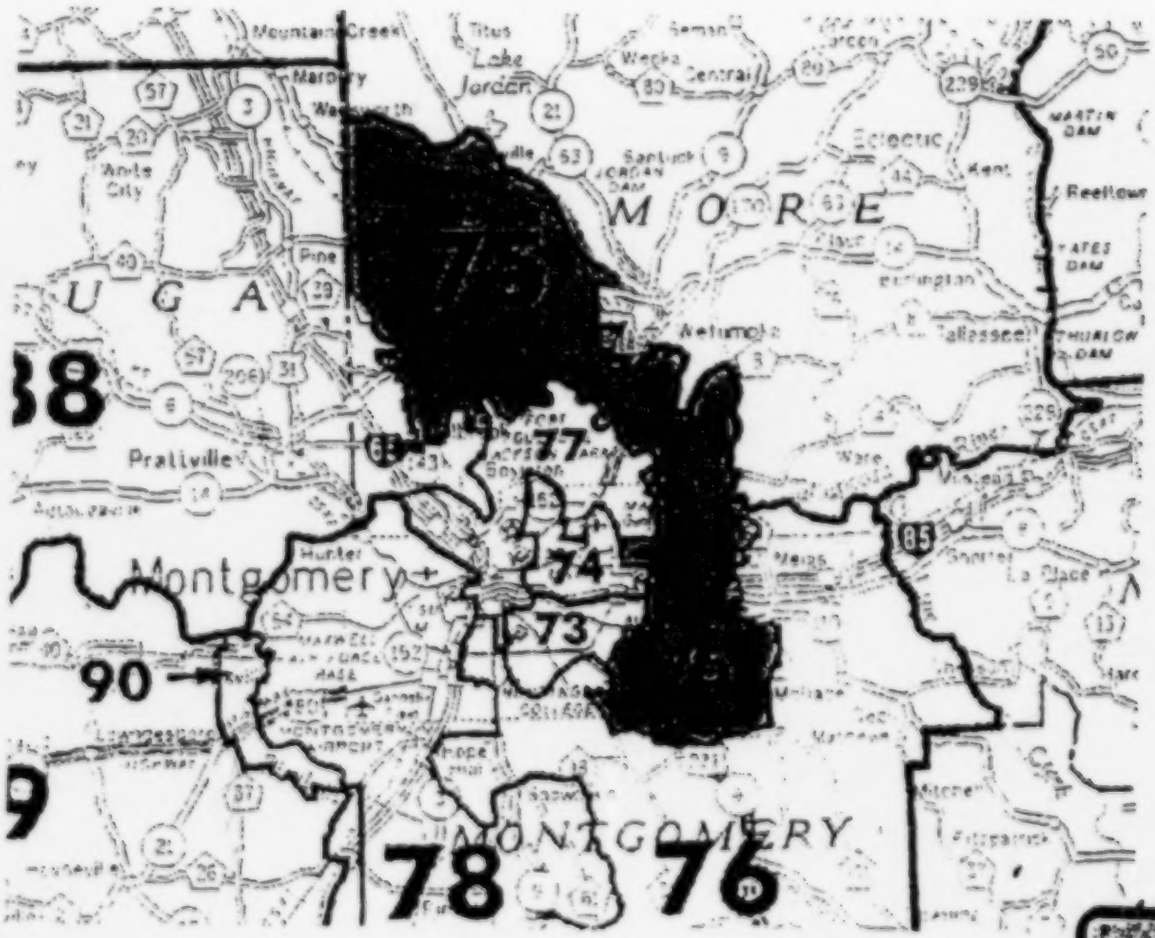


PLAINTIFF'S EXHIBIT 357

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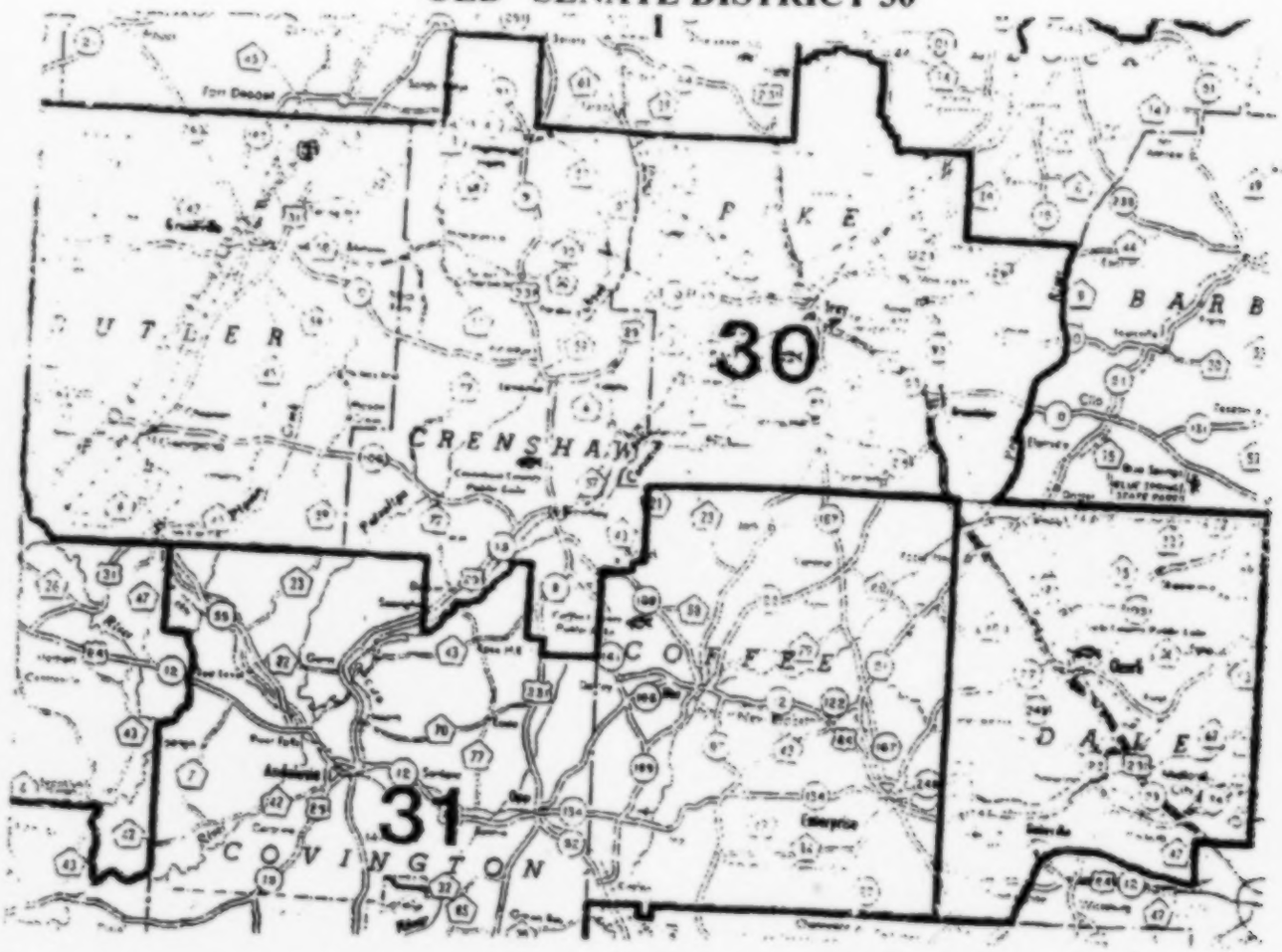


REED-BUSKEY HOUSE DISTRICT 75

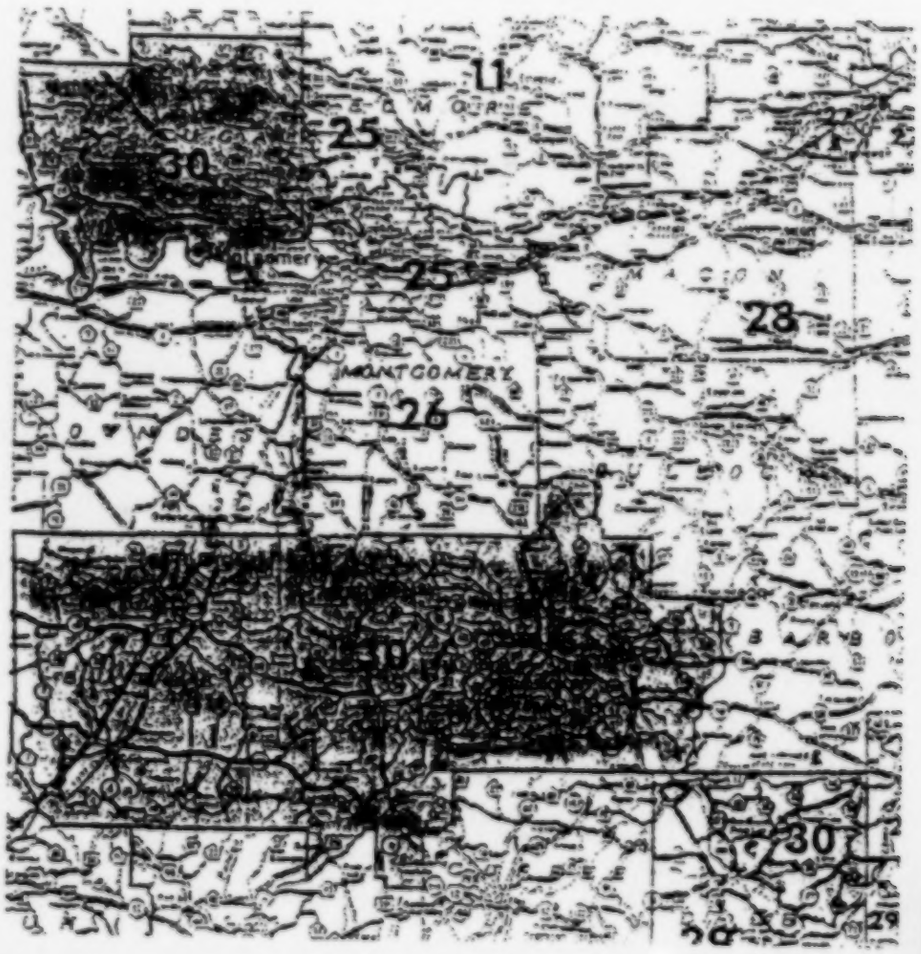


PLAINTIFF'S EXHIBIT 363

"OLD" SENATE DISTRICT 30

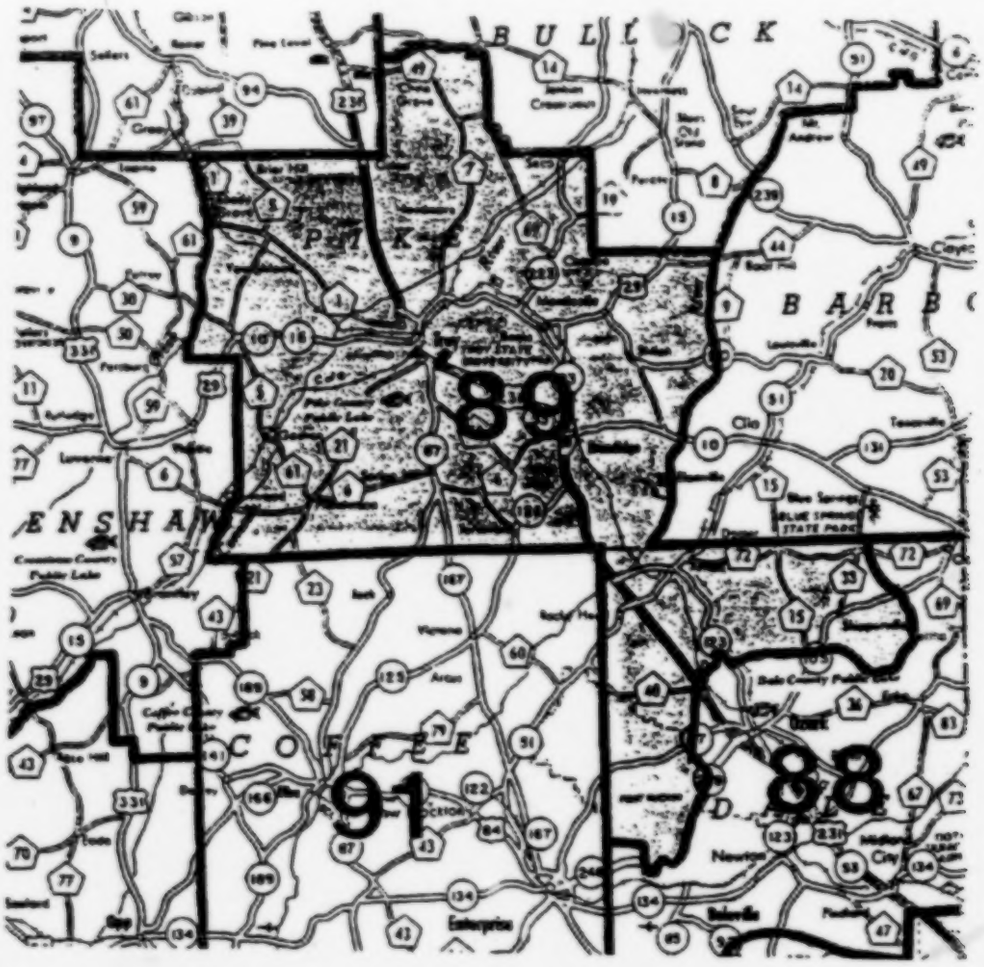


REED-BUSKEY SENATE DISTRICT 30

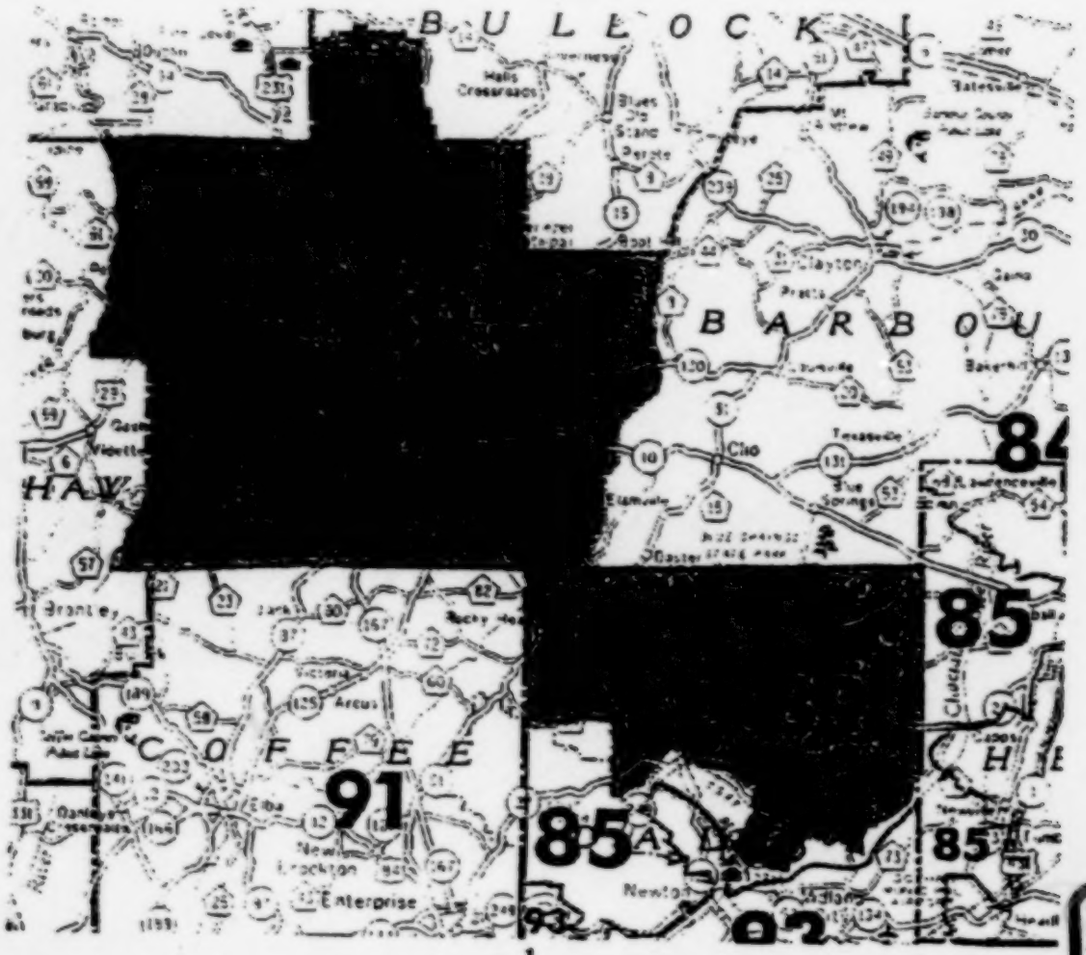


PLAINTIFF'S EXHIBIT 359

"OLD" HOUSE DISTRICT 89



REED-BUSKEY HOUSE DISTRICT 89



PLAINTIFF'S EXHIBIT 364

"OLD" HOUSE DISTRICT 86

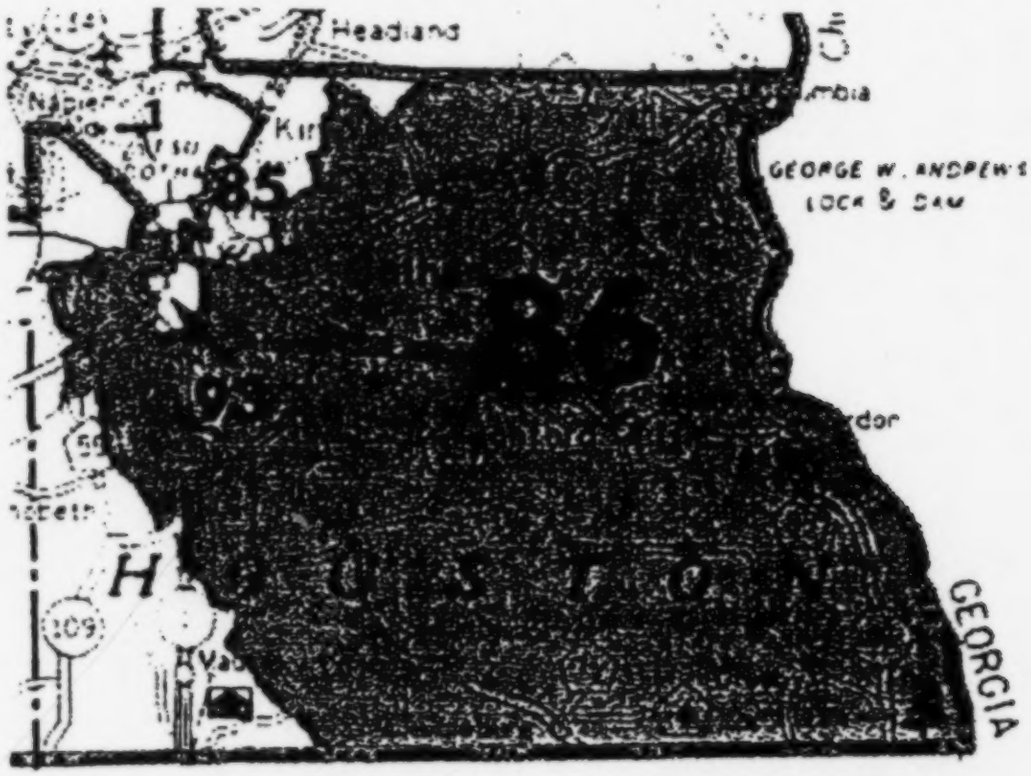


FLORIDA

PLAINTIFF'S EXHIBIT 365

83a

REED-BUSKEY HOUSE DISTRICT 86

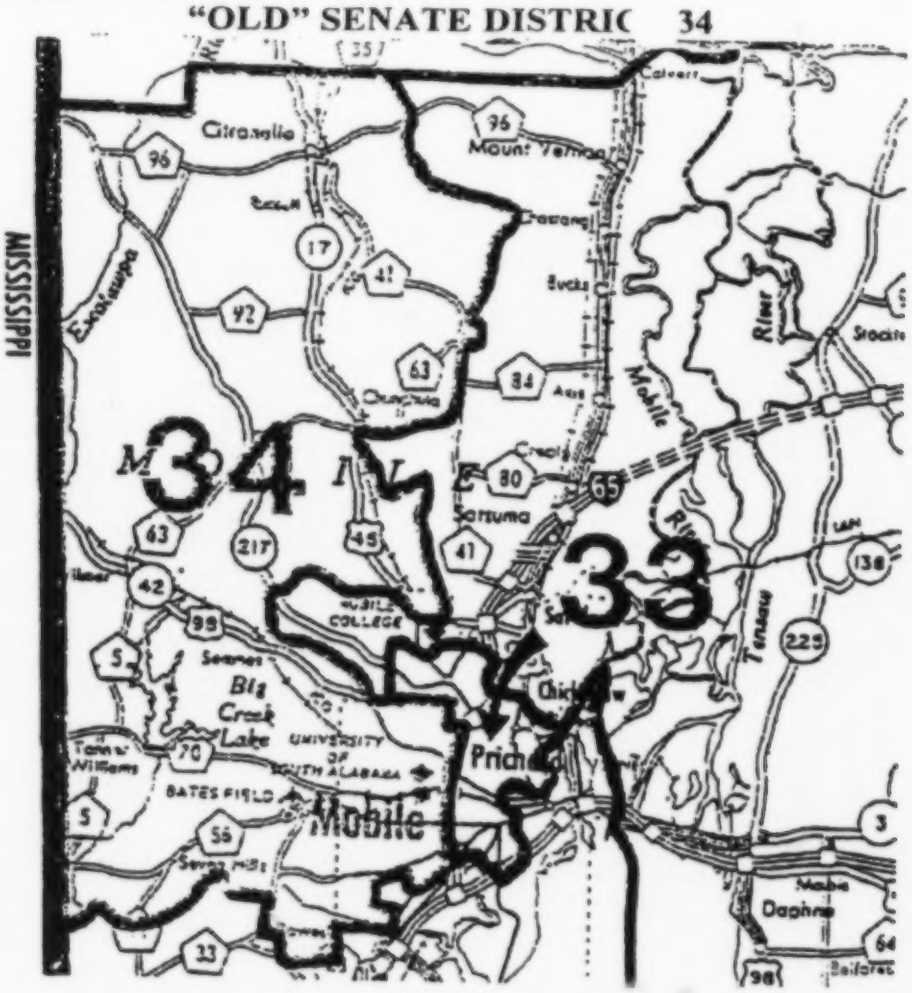


FLORIDA

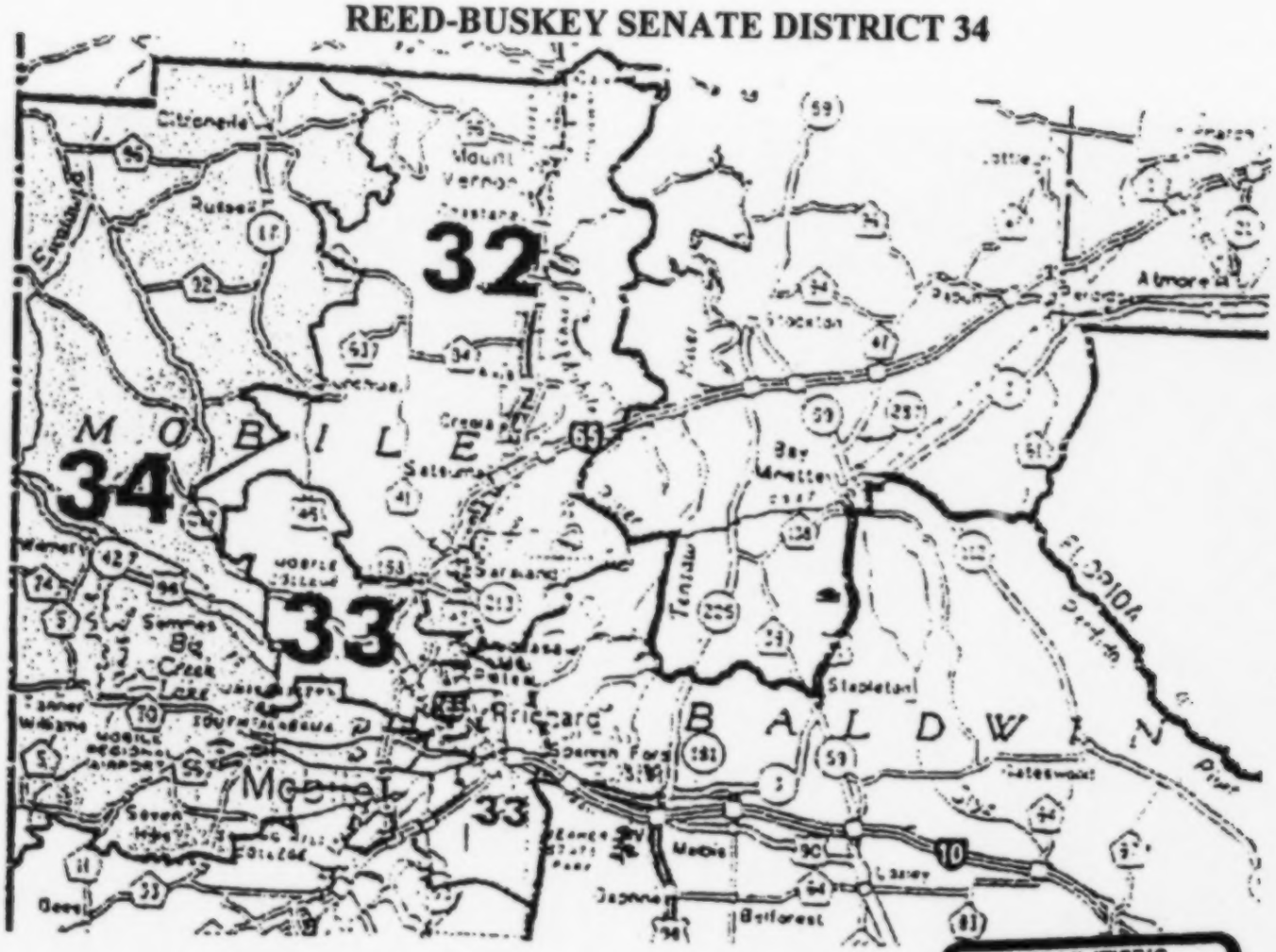
APPENDIX "D"

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"OLD" SENATE DISTRIC 34



REED-BUSKEY SENATE DISTRICT 34



APPENDIX "E"

PLAINTIFF'S EXHIBIT 360

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

ANDREW D. THOMPSON, JR., PEGGY C. KELLEY, GONZALO F. MONTIEL, DANIEL P. BROWN, W. RICARDO MONTIEL, M.D., KAREN D. OUTLAW, BIBB GUNTER, and GENAE SPINKS,

Plaintiffs,

v. CIVIL ACTON NO. 97-A-715-E

JAMES BENNETT, in his official capacity as Secretary of State of Alabama, and THE STATE OF ALABAMA,

Defendants,

and

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, and ANDREW HAYDEN,

Defendants.

FINAL JUDGMENT & INJUNCTION

(Filed Apr. 24, 2000)

Before COX, Circuit Judge, ALBRITTON, Chief District Judge, and THOMPSON, District Judge.

It is ORDERED, ADJUDGED, and DECREED that:

(1) The court's judgment entered on January 6, 2000 is AMENDED to provide that Daniel P. Brown's claim

challenging Alabama House of Representatives District 73 is DISMISSED FOR WANT OF JURISDICTION;

(2) The following claims are DISMISSED FOR WANT OF JURISDICTION: Andrew D. Thompson, Jr.'s claim challenging House District 82; Peggy C. Kelley's claim challenging House District 88; Gonzalo F. Montiel's claims challenging Alabama Senate District 34 and House District 101; and Karen D. Outlaw's claim challenging House District 89;

(3) House Districts 63, 75, and 86, and Senate Districts 21, 25, 29, and 30 are DECLARED to violate the Equal Protection Clause of the United States Constitution;

(4) The defendant James Bennett, as Secretary of State of Alabama, and his successors in office are ENJOINED from conducting any election for a representative to the Alabama House of Representatives from House Districts 63, 75, or 86, and from conducting any election for a senator of the Alabama Senate from Senate Districts 21, 25, 29, or 30, without prior approval of this court; and

(5) Costs are taxed against the defendants James Bennett, in his official capacity as Secretary of State of Alabama, and the State of Alabama, for which execution may issue.

The clerk of the court is DIRECTED to issue a writ of injunction.

DONE at Montgomery this 24th day of April, 2000.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

PEGGY C. KELLEY, GONZALO F. MONTIEL DANIEL P. BROWN, W. RICARDO, MONTIEL, M.D., KAREN D. OUTLAW, BIB GUNTER, and GENAE SPINKS	)	
Plaintiffs,	)	CIVIL ACTION No. 97-A-715-E
v.	)	
JAMES BENNETT, in his official capacity as Secretary of State of Alabama, and THE STATE OF ALABAMA,	)	
Defendants,	)	
and	)	
DARRYL SINKFIELD, QUINTON ROSS BERNEST BROOKS, RUBIN McKINNON, and ANDREW HAYDEN,	)	
Defendants.	)	

WRIT OF INJUNCTION

TO: JAMES BENNETT, in his official capacity as Secretary of State of Alabama, and THE STATE OF ALABAMA

TAKE NOTICE that you, your officers, agents, servants, employees, and those persons in active concert or participation with you, be and you are hereby ENJOINED and RESTRAINED as more particularly set out in the

Memorandum Opinion, Final Judgment and Injunction entered by this Court in this cause and filed with the Clerk of this Court on this date, copies of which are herewith served upon you.

This writ of injunction is issued in accordance with said Memorandum Opinion and Final Judgement and Injunction.

WITNESS my hand the seal of this Court on this the 24th day of April, 2000, at Montgomery, Alabama.

/s/ Debra P. Hackett
Debra P. Hackett
Clerk of the U.S. District Court
for the Middle District of Alabama

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

ANDREW THOMPSON, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 97-A-715-E
JAMES BENNETT, et al.,	)	
Defendants.	)	

ORDER

(Filed Apr. 24, 2000)

Before COX, Circuit Judge, ALBRITTON, Chief District Judge, and THOMPSON, District Judge.

BY THE COURT

1. The State's Renewed Motion to Dismiss (Doc. # 167) filed on August 19, 1999 is DENIED as MOOT. The issues of standing, res judicata and mootness, raised by the Motion, are addressed in the Court's Memorandum Opinion of April 24, 2000 (Doc. #352) and Final Judgment and Injunction (Doc. # 353) entered pursuant thereto.

2. The Sinkfield Defendants' Motion for Judgment on the Pleadings or Alternatively for Summary Judgment (Doc. #168) filed on August 20, 1999 is DENIED as MOOT. The issues of standing and res judicata raised by the Motion, are addressed in the Memorandum Opinion of April 24, 2000 and Final Judgment and Injunction

entered pursuant thereto. Also, the issue of whether the Thompson Plaintiffs alleged sufficient facts to carry their burden to avoid summary judgment is addressed by the court in its Memorandum Opinion in its discussion of the merits of the Thompson Plaintiffs' claims.

3. The Sinkfield Defendants' Supplemental Motion for Summary Judgment with Respect to All Plaintiffs (Doc. # 231) filed on November 4, 1999 is DENIED as MOOT. The issues of mootness or laches and issue preclusion raised by the Motion are addressed in the Court's Memorandum Opinion of April 24, 2000 and Final Judgment and Injunction entered pursuant thereto.

4. The Sinkfield Defendants' Pretrial Motion in Limine (Doc. #337) filed on January 28, 2000 is DENIED as MOOT.

Done this 24th day of April, 2000.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

PEGGY C. KELLEY, GONZALO F. MONTIEL, DANIEL P. BROWN, W. RICARDO MONTIEL, M.D., KAREN D. OUTLAW, BIBB GUNTER, and GENAE SPINKS,

Plaintiffs,

v.

JAMES BENNETT, in his official capacity as Secretary of State of Alabama, and THE STATE OF ALABAMA,

Defendants,

and

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, and ANDREW HAYDEN,

Defendants.

CIVIL ACTION NO. 97-A-715-E (three-judge court)

NOTICE OF APPEAL BY THE STATE DEFENDANTS

(Filed May 23, 2000)

Jim Bennett, in his official position as Secretary of State of Alabama, and the State of Alabama, defendants in this action, give this notice of appeal to the United States Supreme Court from the Final Judgment and Injunction, docket no. 353, the Writ of Injunction, docket no. 354, and the collateral Memorandum Opinion, docket no. 352, each of which was entered on April 24, 2000. This

appeal is taken under 28 U.S.C. § 1253 and 28 U.S.C. § 2284.

Respectfully submitted this 23rd day of May, 2000.

BILL PRYOR (PRY002)
ATTORNEY GENERAL
BY:

/s/ Alice Ann Byrne
One of the attorneys for Jim Bennett, in his official capacity as Secretary of State of Alabama, and the State of Alabama

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has this 23rd day of May, 2000, been served by United States Mail to the following:

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/s/ Alice Ann Byrne
OF COUNSEL

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

PEGGY C. KELLEY, GONZALO F. MONTIEL, GENAE SPINKS, DANIEL P. BROWN, W. RICARDO MONTIEL, KAREN D. OUTLAW, and BIBB GUNTER,	)	
Plaintiffs,	)	
v.	)	
JAMES BENNETT, in his official capacity as Secretary of State of Alabama, THE STATE OF ALABAMA	)	Civil Action No. 97-A-715-E
and	)	
DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, and ANDREW HAYDEN,	)	
Defendants.	)	

NOTICE OF APPEAL

(Filed May 23, 2000)

Notice is hereby given that Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon, and Andrew Hayden, defendants above named, pursuant to 28 U.S.C. 1253, hereby appeal to the Supreme Court of the United States from the "final judgment & injunction" of the three

judge district court entered in this action on 24 April 2000. Dated: May 23, 2000

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Darryl Sinkfield, et al.

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that, prior to or immediately after filing the foregoing with the Court, I mailed or delivered a copy to:

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Date: May 23, 2000

/s/ Larry Menefee
Attorney for Darryl Sinkfield et al.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

JOHN RICE AND CAMILLA L. RICE, individually and on behalf of a Class of non-African American voters,	)	
Plaintiffs,	)	
v.	)	
HAL SMITH, in his official capacity as Probate Judge of Lee County, Alabama, and JAMES BENNETT, in his official capacity as Secretary of State of Alabama, and DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, and ANDREW HAYDEN, individually and on behalf of African-American voters, STATE OF ALABAMA,	)	Case No. 97-A-715-E
Defendants.	)	

VERIFIED COMPLAINT

(Filed May 2, 1997)

NATURE OF ACTION

1. This action is filed to obtain relief against the racially gerrymandered and malapportioned districts used to elect members of the Alabama State Legislature since 1993. Relief is sought pursuant to 42 U.S.C. § 1983,

42 U.S.C. § 1988, 28 U.S.C. § 1651, and 28 U.S.C. § 2201 and 28 U.S.C. § 1343(3).

JURISDICTION

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, and 28 U.S.C. § 1343 as this case involves a question arising under the laws or Constitution of the United States, and it seeks to redress the deprivation, under color of state law, of an equal right secured by the Constitution of the United States. Further, there is no adequate State remedy to pursue because Art. VIII, §§ 198 and 200 prohibit the State legislature from reapportionment until the next decennial census.

PARTIES

3. Plaintiff John Rice is an adult resident citizen of Lee County, Alabama, and is a registered voter of the State of Alabama. He is a resident of, and registered voter in Alabama Senate District 27, and Alabama House of Representatives District 79, which were established by the State Partial Consent Decree entered in *Sinkfield v. Camp*, (CV93-689-PR. May 12, 1993) (State Partial Consent Decree is attached as Exhibit "A" to this complaint). He is a Plaintiff asserting his own rights as well as the rights of a class of registered voters and citizens of the State of Alabama who are not African-American or black.

4. Plaintiff Camilla L. Rice is an adult resident citizen of Lee County, Alabama and is a registered voter of the State of Alabama. She is a resident of, and registered

voter in Alabama Senate District 28 and Alabama House of Representatives District 83, which were established by the State Partial Consent Decree entered in *Sinkfield v. Camp*, (CV-93-689-PR, May 12, 1993). She is a Plaintiff asserting her own rights as well as the rights of a class of registered voters and citizens of the State of Alabama who are not African-American or black.

5. Defendant Hal Smith is the Probate Judge of Lee County, Alabama. He is a defendant in his official capacity only, and as a representative of the class of probate judges. At all times referred to herein, he is acting under color of State law.

6. Defendant James Bennett is the Secretary of State of Alabama. He is a defendant in his official capacity only. At all times referred to herein, he is acting under color of State law.

7. Defendant Sinkfield, is over the age of 21 years, a citizen of the United States and of the State of Alabama, and is a resident and qualified elector of Montgomery County, Alabama. Defendant Ross, is over the age of 21 years, a citizen of the United States and of the State of Alabama, and is a resident and qualified elector of Montgomery County, Alabama. Defendant Brooks, is over the age of 21 years, a citizen of the United States and of the State of Alabama, and is a resident and qualified elector of Coffee County, Alabama. Defendant McKinnon, is over the age of 21 years, a citizen of the United States and of the State of Alabama, and is a resident and qualified elector of Coffee County, Alabama. Defendant Hayden, is over the age of 21 years, a citizen of the United States and of the State of Alabama, and is a resident and qualified

elector of Perry County, Alabama. Defendants Sinkfield, Ross, Brooks, McKinnon and Hayden are African-American, and were the plaintiffs in the action which resulted in the entry of the State Partial Consent Decree in Sinkfield, and they were parties to that judgment. They are named because the relief sought here can have an impact on the judgment they obtained in the Montgomery County Circuit Court, and to serve as representatives of the same class of African-American voters they represented in obtaining the consent judgment in the *Sinkfield* case.

8. Defendant State of Alabama is named to secure full relief pursuant to 42 U.S.C. § 1988, and may be liable for attorneys fees attributable to any judgment in this case.

VENUE

9. Venue is proper in the Middle District of Alabama and in its Eastern Division pursuant to 28 U.S.C. § 1391 because the Plaintiffs reside in Lee County, because a Defendant with significant duties under the election laws of the State of Alabama, the Probate Judge of Lee County, resides in Lee County, because the Secretary of State and other Defendants perform duties there, and because this action is not based on diversity of citizenship.

STATEMENT OF FACTS

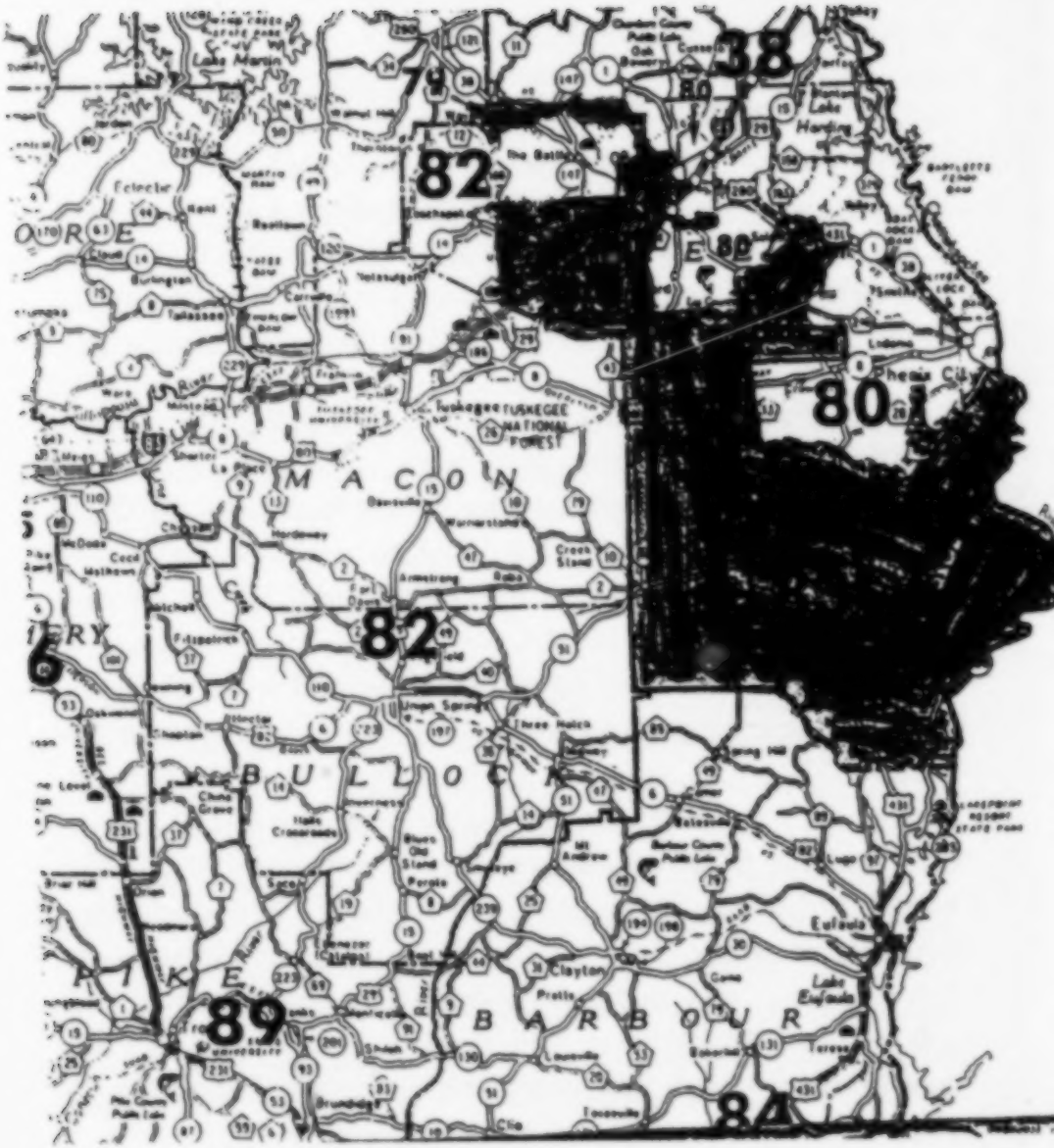
10. The Alabama Senate is composed of thirty-five members elected from single member districts pursuant

to § 29-1-2.3, Code of Alabama 1975. The Alabama House of Representatives is composed of one hundred-five members elected from single member districts pursuant to § 29-1-1.2, Code of Alabama 1975.

11. After the 1980 census, as a result of population changes and as required by Ala. Const. Art. VIII, §§ 198, 199, and 200, the House and Senate district lines needed to be redrawn to accord equal population to each district. Thereafter, the legislature passed Act No. 83-154 which prescribed a new redistricting plan for the legislature.

12. Following the 1990 census, the legislature failed to adopt a redistricting plan which accounted for the population changes reflected by the 1990 census. In 1993, a class action suit was filed in state court on behalf of African-American or black voters challenging the constitutionality of Act No. 83-154. On May 11, 1993, the parties filed a Joint Motion for Approval of State Partial Consent Decree Regarding Legislative Redistricting (attached as Exhibit "B"). On May 12, 1993, a State Partial Consent Decree was entered into by the African-American plaintiffs and the State of Alabama, in which Act No. 83-154 was found to be unconstitutional and a redistricting plan, hereinafter referred to as the Reed Buskey House and Senate Plan, (attached as Exhibit "C") was adopted for use in the 1994 primary and general elections. The Plan provided for districting using the geographic shapes and population apportionment set forth below:

In particular, Plaintiffs are concerned about the shape of Senate districts 27 and 28, and House districts 79 and 83, which are shown in highlighted form below:

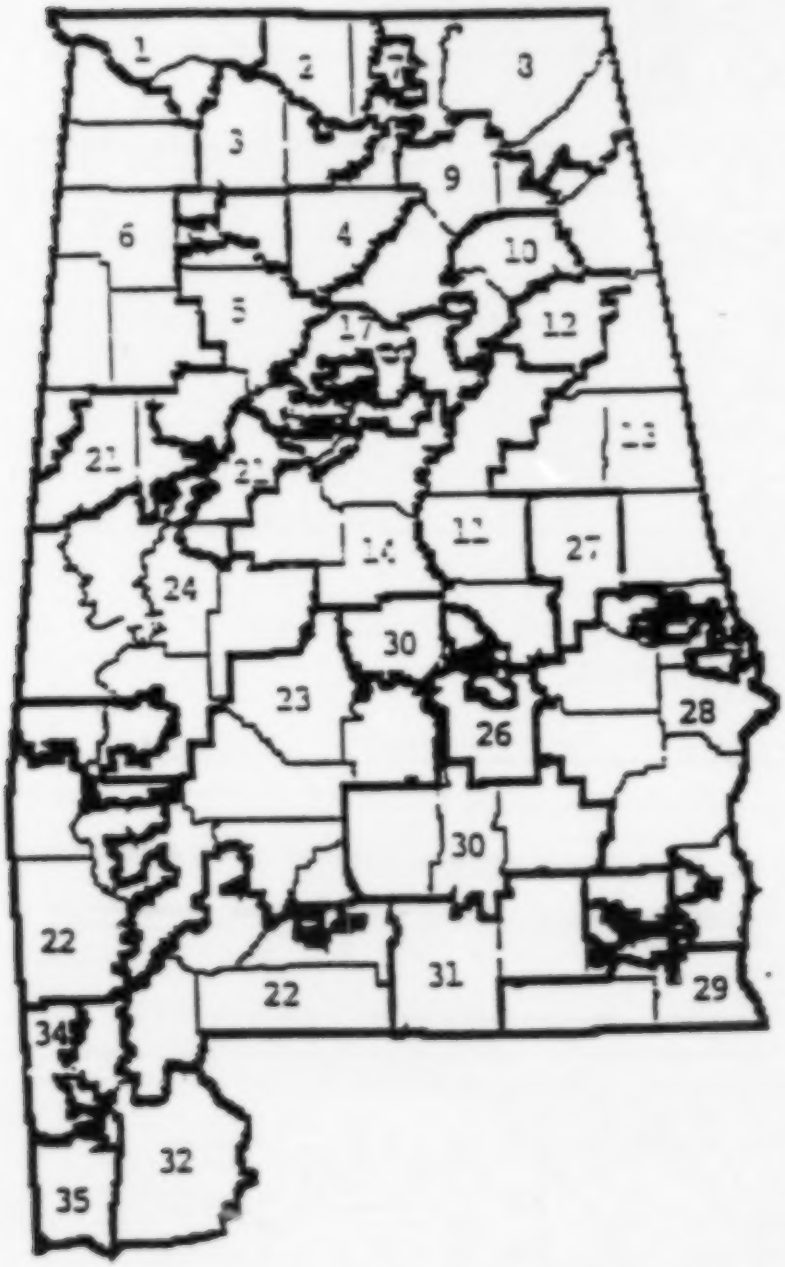

82
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BARBOUR
Tuskegee
TUSKEGEE NATIONAL FOREST
Clayton
Eufaula
Lake Eufaula

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The Reed Buskey Senate Plan Court



B: ALABAMA

District Statistics
Total Populations, All Ages
Plan: The Reed Buskey Senate Court

Date: 5/5/93
Time: 4:07 p.m.
Page: 1

Plan type: SENATE DISTRICTS

District Name	Number Members	Total Population	Ideal Population	District Variance	% District Variance
District 1	1	119,450	115,445	4,005	3.47%
District 2	1	116,593	115,445	1,148	0.99%
District 3	1	119,998	115,445	4,553	3.94%
District 4	1	119,652	115,445	4,207	3.64%
District 5	1	120,505	115,445	5,060	4.38%
District 6	1	116,850	115,445	1,405	1.22%
District 7	1	117,162	115,445	1,717	1.49%
District 8	1	115,750	115,445	305	0.26%
District 9	1	119,868	115,445	4,423	3.83%
District 10	1	112,211	115,445	-3,234	-2.80%
District 11	1	111,107	115,445	-4,338	-3.76%
District 12	1	116,034	115,445	589	0.51%
District 13	1	117,601	115,445	2,156	1.87%
District 14	1	119,467	115,445	4,022	3.48%
District 15	1	111,830	115,445	-3,615	-3.13%

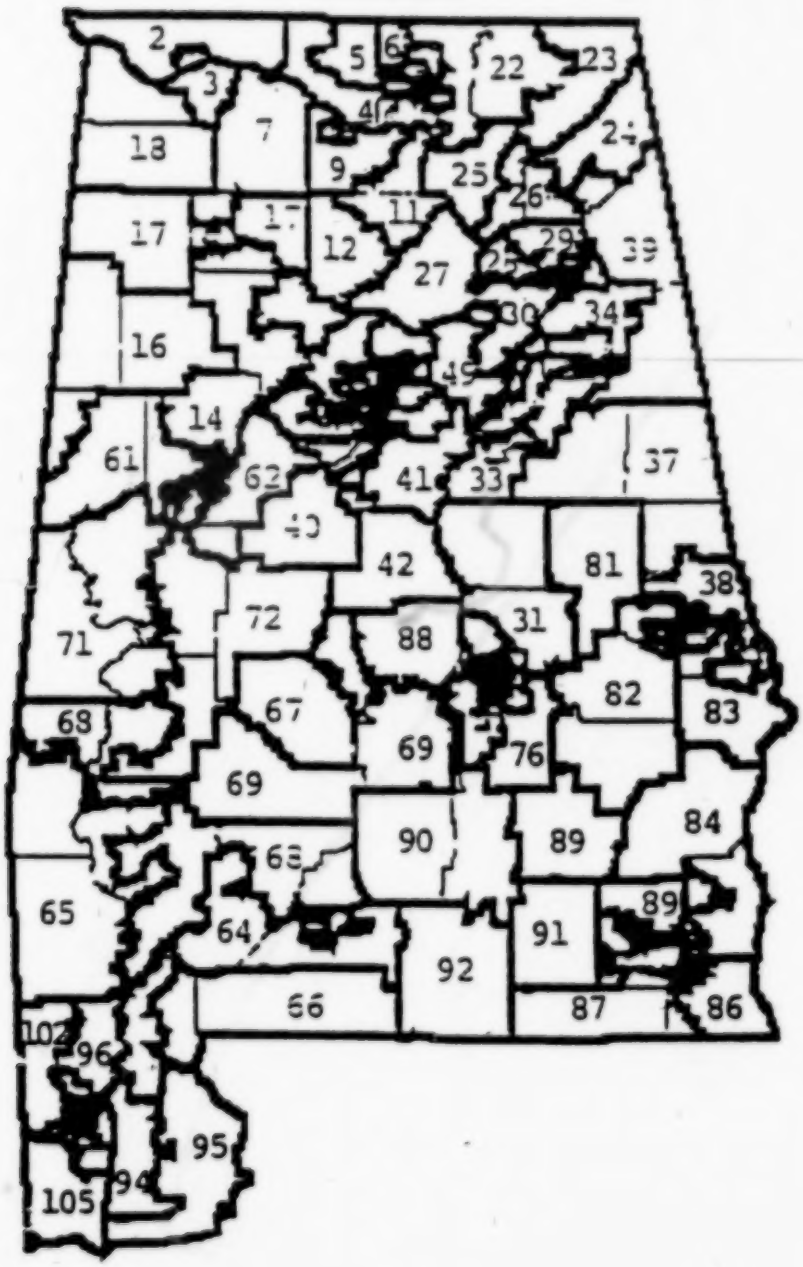
District Name	Number Members	Total Population	Ideal Population	District Variance	% District Variance
District 16	1	120,034	115,445	4,589	3.98%
District 17	1	116,184	115,445	739	0.64%
District 18	1	110,075	115,445	-5,370	-4.65%
District 19	1	110,021	115,445	-5,424	-4.70%
District 20	1	110,010	115,445	-5,435	-4.71%
District 21	1	119,443	115,445	3,998	3.46%
District 22	1	117,622	115,445	2,177	1.89%
District 23	1	110,580	115,445	-4,865	-4.21%
District 24	1	112,121	115,445	-3,324	-2.88%
District 25	1	119,654	115,445	4,209	3.65%
District 26	1	110,325	115,445	-5,120	-4.44%
District 27	1	119,555	115,445	4,110	3.56%
District 28	1	115,071	115,445	-374	-0.32%
District 29	1	113,209	115,445	-2,236	-1.94%
District 30	1	109,857	115,445	-5,588	-4.84%
District 31	1	113,359	115,445	-2,086	-1.81%
District 32	1	117,421	115,445	1,976	1.71%
District 33	1	110,147	115,445	-5,298	-4.59%

District Name	Number Members	Total Population	Ideal Population	District Variance	% District Variance
District 34	1	118,515	115,445	3,070	2.66%
District 35	1	113,306	115,445	-2,139	-1.85%
Total	35	4,040,587	4,040,575	12	0.00%

NATIONWIDE STATISTICS:

Range of populations:	109,857 to 120,505
Ratio range:	1.0969
Absolute range:	-5.588 to 5.060
Absolute overall range:	10.648
Relative range:	-4.84 to 4.38%
Relative overall range:	9.22%
Absolute mean deviation:	3340.11
Relative mean deviation:	2.89%
Standard deviation:	3710.3685

The Reed Buskey House Plan Court



B: ALABAMA

District Statistics
Total Populations, All Ages
Plan: The Reed Buskey House Court

Date: 5/6/93
Time: 1:49 p.m.
Page: 1

Plan type: HOUSE DISTRICTS

District Name	Number Members	Total Population	Ideal Population	District Variance	% District Variance
District 1	1	39,362	38,482	880	2.29%
District 2	1	40,299	38,482	1,817	4.72%
District 3	1	39,789	38,482	1,307	3.40%
District 4	1	38,352	38,482	-130	-0.34%
District 5	1	39,463	38,482	981	2.55%
District 6	1	38,778	38,482	296	0.77%
District 7	1	40,351	38,482	1,869	4.86%
District 8	1	39,354	38,482	872	2.27%
District 9	1	40,293	38,482	1,811	4.71%
District 10	1	40,264	38,482	1,782	4.63%
District 11	1	39,117	38,482	635	1.65%
District 12	1	40,271	38,482	1,789	4.65%
District 13	1	40,183	38,482	1,701	4.42%
District 14	1	40,388	38,482	1,906	4.95%

District Name	Number Members	Total Population	Ideal Population	District Variance	% District Variance
District 15	1	39,934	38,482	1,452	3.77%
District 16	1	36,773	38,482	-1,709	-4.44%
District 17	1	40,386	38,482	1,904	4.95%
District 18	1	39,691	38,482	1,209	3.14%
District 19	1	37,903	38,482	-579	-1.50%
District 20	1	40,370	38,482	1,888	4.91%
District 21	1	38,889	38,482	407	1.06%
District 22	1	36,836	38,482	-1,646	-4.28%
District 23	1	38,609	38,482	127	0.33%
District 24	1	40,305	38,482	1,823	4.74%
District 25	1	40,217	38,482	1,735	4.51%
District 26	1	40,403	38,482	1,921	4.99%
District 27	1	39,248	38,482	766	1.99%
District 28	1	38,141	38,482	-341	-0.89%
District 29	1	37,485	38,482	-997	-2.59%
District 30	1	36,585	38,482	-1,897	-4.93%
District 31	1	37,000	38,482	-1,482	-3.85%
District 32	1	38,521	38,482	39	0.10%

District Name	Number Members	Total Population	Ideal Population	District Variance	% District Variance
District 33	1	36,594	38,482	-1,888	-4.91%
District 34	1	38,606	38,482	124	0.32%
District 35	1	38,212	38,482	-270	-0.70%
District 36	1	38,208	38,482	-274	-0.71%
District 37	1	40,401	38,482	1,919	4.99%
District 38	1	40,369	38,482	1,887	4.90%
District 39	1	36,831	38,482	-1,651	-4.29%
District 40	1	40,148	38,482	1,666	4.33%
District 41	1	39,021	38,482	539	1.40%
District 42	1	40,298	38,482	1,816	4.72%
District 43	1	36,605	38,482	-1,877	-4.88%
District 44	1	36,804	38,482	-1,678	-4.36%
District 45	1	38,421	38,482	-61	-0.16%
District 46	1	40,304	38,482	1,822	4.73%
District 47	1	39,360	38,482	878	2.28%
District 48	1	40,370	38,482	1,888	4.91%
District 49	1	37,638	38,482	-844	-2.19%
District 50	1	39,293	38,482	811	2.11%

District Name	Number Members	Total Population	Ideal Population	District Variance	% District Variance
District 51	1	39,253	38,482	771	2.00%
District 52	1	36,656	38,482	-1,826	-4.75%
District 53	1	36,565	38,482	-1,917	-4.98%
District 54	1	36,854	38,482	-1,628	-4.23%
District 55	1	36,598	38,482	-1,884	-4.90%
District 56	1	36,722	38,482	-1,760	-4.57%
District 57	1	36,701	38,482	-1,781	-4.63%
District 58	1	36,606	38,482	-1,876	-4.88%
District 59	1	36,590	38,482	-1,892	-4.92%
District 60	1	36,814	38,482	-1,668	-4.33%
District 61	1	39,107	38,482	625	1.62%
District 62	1	40,045	38,482	1,563	4.06%
District 63	1	40,291	38,482	1,809	4.70%
District 64	1	40,314	38,482	1,832	4.76%
District 65	1	38,154	38,482	-328	-0.85%
District 66	1	39,154	38,482	672	1.75%
District 67	1	36,612	38,482	-1,870	-4.86%
District 68	1	37,391	38,482	-1,091	-2.84%

District Name	Number Members	Total Population	Ideal Population	District Variance	% District Variance
District 69	1	36,577	38,482	-1,905	-4.95%
District 70	1	37,866	38,482	-616	-1.60%
District 71	1	36,866	38,482	-1,616	-4.20%
District 72	1	37,389	38,482	-1,093	-2.84%
District 73	1	40,396	38,482	1,914	4.97%
District 74	1	39,732	38,482	1,250	3.25%
District 75	1	39,526	38,482	1,044	2.71%
District 76	1	36,628	38,482	-1,854	-4.82%
District 77	1	37,125	38,482	-1,357	-3.53%
District 78	1	36,572	38,482	-1,910	-4.96%
District 79	1	40,326	38,482	1,844	4.79%
District 80	1	40,403	38,482	1,921	4.99%
District 81	1	38,826	38,482	344	0.89%
District 82	1	38,257	38,482	-225	-0.58%
District 83	1	40,229	38,482	1,747	4.54%
District 84	1	36,585	38,482	-1,897	-4.93%
District 85	1	36,569	38,482	-1,913	-4.97%
District 86	1	39,662	38,482	1,180	3.07%

District Name	Number Members	Total Population	Ideal Population	District Variance	% District Variance
District 87	1	36,978	38,482	-1,504	-3.91%
District 88	1	36,601	38,482	-1,881	-4.89%
District 89	1	36,562	38,482	-1,920	-4.99%
District 90	1	36,694	38,482	-1,788	-4.65%
District 91	1	40,240	38,482	1,758	4.57%
District 92	1	36,478	38,482	-2,004	-5.21%
District 93	1	36,641	38,482	-1,841	-4.78%
District 94	1	40,347	38,482	1,865	4.85%
District 95	1	40,399	38,482	1,917	4.98%
District 96	1	36,675	38,482	-1,807	-4.70%
District 97	1	36,612	38,482	-1,870	-4.86%
District 98	1	36,611	38,482	-1,871	-4.86%
District 99	1	36,924	38,482	-1,558	-4.05%
District 100	1	40,321	38,482	1,839	4.78%
District 101	1	39,839	38,482	1,357	3.53%
District 102	1	38,338	38,482	-144	-0.37%
District 103	1	36,602	38,482	-1,880	-4.89%
District 104	1	38,653	38,482	171	0.44%
District 105	1	38,068	38,482	-414	-1.08%
Total	105	4,040,587	4,040,610	-23	0.00%

NATIONWIDE STATISTICS:

Range of populations:	36,478 to 40,403
Ratio range:	1.1076
Absolute range:	-2.004 to 1.921
Absolute overall range:	3.925
Relative range:	-5.21 to 4.99%
Relative overall range:	10.20%
Absolute mean deviation:	1365.74
Relative mean deviation:	3.55%
Standard deviation:	1499.9258

13. The House and Senate Plan was designed by Dr. Joe Reed, a noted political figure in Alabama who is active in efforts to advance the cause of blacks in Alabama politics, and John Buskey, also a noted political figure who, at the time, was active in efforts to advance the cause of blacks in Alabama politics.

14. A final judgment (attached as Exhibit "D") approving the State Partial Consent Decree was entered on August 13, 1993 after the Plan had received preclearance under section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c) from the United States Justice Department.

15. The House and Senate Districts which were drawn following the Consent Decree have remained the same since the 1994 primary and general elections.

PLAINTIFF CLASS ACTION ALLEGATIONS

16. Plaintiffs bring this action on their own behalf and as representatives on behalf of other voters, who are not African-American or black, and who have and will continue to suffer in the future, a loss of equal voting rights secured by the Fourteenth Amendment as a result of the enforcement by Defendants Bennett and Smith of the redistricting plans which were adopted by the State Partial Consent Decree Judgment in Sinkfield. This class of persons is so numerous that joinder of all members is impracticable. There are questions of law or fact common to the class. The claims of Plaintiffs are typical of the claims of other members of the class. The Plaintiffs will fairly and adequately protect the interests of the class. In enforcing the existing district lines established by the

judgment, Defendant Bennett, as well as Defendant Smith and the class he represents, have acted or will act on grounds generally applicable to the class of voters participating in the election of members of the Alabama Senate and House of Representatives, and therefore, final injunctive or declaratory relief is appropriate with respect to the class as a whole.

DEFENDANT CLASS ALLEGATIONS

17. Defendant Smith is the Probate Judge of Lee County, Alabama. He is a party defendant as a representative of similarly situated probate judges who are directed by Alabama law to arrange for the printing of election ballots to certify election results, including those ballots and results for elections of members of the Alabama Senate and House of Representatives. This class is so numerous that joinder of all members is impracticable as there are 67 such probate judges. There are questions of law or fact common to the class. The defenses of Smith are typical of the defenses of other members of the Defendant Class. Defendant Smith will fairly and adequately protect the interests of the class of probate judges. Because Plaintiffs seek to require the change of district boundaries, and because probate judges arrange for the printing of election ballots and certified election results for the county in each of these districts, Plaintiffs seek relief generally applicable to the class of probate judges, and final injunctive or declaratory relief is appropriate with respect to the class as a whole. In addition, adjudication of the rights of Smith will be dispositive, as a practical matter, of the interests of other probate judges who are not parties to this action, and further, inconsistent or

varying adjudications with respect to other members of the class would establish incompatible standards for the conduct of probate judges.

18. Defendants Sinkfield, Ross, Brooks, McKinnon, and Hayden are parties to this action because they are the class representatives for the African-American or black voters of Alabama who have rights as beneficiaries of the *Sinkfield* judgment challenged here, and they are named as class representatives of persons who are similarly situated African-American or black electors of the State of Alabama. There are questions of law or fact common to the members of this defendant class. The defenses of Sinkfield, Ross, Brooks, McKinnon, and Hayden are typical of the defenses of other members of the defendant class of African-American or black electors of the State of Alabama. Adjudication of the rights of Sinkfield, Ross, Brooks, McKinnon and Hayden would be dispositive, as a practical matter, of the interests of other African-American or black voters who are not parties to this action, and further inconsistent or varying adjudications with respect to other standards for protecting the rights of African-American electors. The class is so numerous that joinder of all members is impracticable, and Defendants Sinkfield, Ross, Brooks, McKinnon, and Hayden will fairly and adequately protect the interests of the class as a whole.

FIRST CAUSE OF ACTION

EQUAL PROTECTION

Failure to Establish Population Equality As Nearly As Practicable

19. Plaintiffs allege and incorporate by reference herein each and every allegation in paragraphs 1 through 18 above.

20. The single member election districts for the Alabama Senate and House of Representatives as ordered by the *Sinkfield* judgment are unconstitutional because the Reed Buskey Senate and House Plan violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

21. The districts fail to conform to the one person-one vote requirement to achieve precise population equality as nearly as practicable. The districts grossly deviate from equality (with variations greater than +4% and -4% and one house district with a -5.21 % variation from the ideal population) and many of the districts were drawn solely based on racial considerations. Further, the Reed Buskey House plan has a 10.2% population disparity which is more than the allowable 10% variation. This is in clear violation of the principles established in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964).

22. In view of the foregoing, Plaintiffs ask this Court for a judgment that the single member election districts ordered by the Montgomery County Circuit Court in *Sinkfield*, which are being enforced by Defendants under color of State law, are illegal and unconstitutional.

SECOND CAUSE OF ACTION

EQUAL PROTECTION

Racial Gerrymander

23. Plaintiffs allege and incorporate by reference herein each and every allegation in paragraphs 1 through 22 above.

24. The shape of certain Senate and House Districts are so "bizarre," and the racial make-up of the districts so heavily weighted in favor of black citizens as to amount to a racial classification under *Shaw v. Hunt*, 116 S.Ct. 1894 (1996), *Miller v. Johnson*, 115 S.Ct. 2475 (1995), *Bush v. Vera*, 116 S.Ct. 1941 (1996) and *United States v. Hayes*, 115 S.Ct. 2431 (1995) which is constitutionally impermissible.

25. For instance, Senate District 27 encompasses all of Tallapoosa County and winds across a portion of Lee County and into northern Russell County. Senate District 28 encompasses all of Macon, Bullock, and Barbour Counties, most of Henry and Russell Counties, and a portion of Lee County. The Borders of District 27 and 28 are so intertwined in Lee County that the borders look like pieces of a puzzle. Lee County is divided into three Senate Districts.

26. House District 83 encompasses most of Russell County with finger-like extensions into Lee County with one finger in western Lee County, one in central Lee County, and one in southeastern Lee County. House District 79 looks like a river which starts in a small portion of northwestern Lee County and then flows into the portion of land separating the District 83 western and central

finger-like extensions. The House redistricting plan butchers Lee County into five house districts.

27. Plaintiffs allege that race was the "predominant factor" in drawing these district lines without consideration given to traditional redistricting factors such as compactness, contiguity, and respect for political subdivisions. These districts are so bizarre that the boundaries of these districts cannot be explained on any grounds other than race. Therefore, these districts are presumptively unconstitutional, and cannot be justified by the court ordering it established by reference to any compelling State interest.

28. In view of the foregoing, this Court should enter a judgment declaring that the single member election districts ordered by the Montgomery County Circuit Court, establishing House and Senate Districts and which are being enforced by Defendants under color of State law, are illegal and unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment.

THIRD CAUSE OF ACTION

EQUAL PROTECTION

Race-Based Districting (or Voter Dilution)

29. Plaintiffs allege and incorporate by reference herein each and every allegation in paragraphs 1 through 28 above.

30. As presently comprised, there are 8 majority black Senate districts (18, 19, 20, 23, 24, 26, 28, and 33) and twenty-seven majority black House districts (19, 32, 52, 53, 54, 55, 56, 57, 58, 59, 60, 67, 68, 69, 70, 71, 72, 76, 77,

78, 82, 83, 85, 97, 98, 99, 103). According to the 1990 census, of those eight Senate districts, all eight are underpopulated and six are grossly underpopulated (greater than -4% variance) (18, 19, 20, 23, 26, and 33). Only one majority white district is underpopulated (30). There is only one grossly overpopulated Senate district and it is a majority white district (5). Of the twenty-seven majority black House districts, all but two are underpopulated (32 and 83) and nineteen are grossly underpopulated (52, 53, 54, 55, 56, 57, 58, 59, 60, 67, 69, 71, 76, 78, 85, 97, 98, 99, and 103). Of the thirty-three grossly underpopulated House districts, only fourteen majority white districts (out of a total of seventy-eight majority white House districts) are underpopulated. Of the twenty-seven House districts that are [grossly] overpopulated (2, 7, 12, 13, 14, 17, 20, 24, 25, 26, 37, 38, 40, 42, 46, 48, 62, 63, 64, 79, 80, 83, 91, 94, 95, and 100), only one of these is a majority black district (83).

31. Thus, all eight of the majority black Senate districts are underpopulated and six of those eight are grossly underpopulated. Of the seven total Senate districts that are grossly underpopulated, black voters exercise the controlling number of voters in six of these seven districts. Likewise, all but two of the twenty-seven majority black districts are underpopulated and of the thirty-three grossly underpopulated house districts, black voters exercise the controlling number of voters in nineteen districts.

32. The six senate districts and nineteen house districts were designed and approved intentionally to give the other senate and house districts where black voters did not control the outcome of the election substantially

more persons than are contained in these six Senate districts and the nineteen House districts.

33. The six Senate districts and the thirty-two House districts were designed with predominantly race-based, illegal purposes, and for the purpose of creating districts controlled by non-black voters which are malapportioned and which thereby dilute the voting strength of non-black voters. The rights of many voters in Alabama have been impaired merely because of their residence. All voters should have "equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence." *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 1381 (1964).

34. In view of the foregoing, the Court should enter an order declaring that the State Partial Consent Decree which adopted the Reed Buskey Senate and House Plan violates the Equal Protection Clause of the Fourteenth Amendment of the United Constitution and therefore, is unconstitutional and should not be enforced.

PRAYER FOR RELIEF

35. Plaintiffs pray that this Court render judgment against the Defendants and provide the following relief:

(1) Certify this case as a class action pursuant to and in accord with the provisions of Rule 23 of the Federal Rules of Civil Procedure and designating

(a) Plaintiffs as representatives of all Alabama voters not certified as part of the African-American class of voters in *Sinkfield*;

(b) Defendant Hal Smith as representative of a defendant class of the probate judges of the State of Alabama; and

(c) Defendants Sinkfield, Ross, Brooks, McKinnon, and Hayden as representatives of the class of African-American voters of the State of Alabama certified in *Sinkfield*.

(2) Issue an order declaring that it is unconstitutional for the Defendants to enforce the single member election districts established in the consent decree in *Sinkfield*, especially the boundaries of Senate Districts 27 and 28 and House Districts 79 and 83, and further declaring the consent decree to be contrary to law and of no further force or effect.

(3) Issue an order redrawing the boundaries of the single member election districts for the Alabama Senate and House of Representatives with consideration to traditional districting principles and in accordance with Equal Protection and the "one man-one vote" principles.

(4) Issue such other preliminary and permanent injunctive relief as may be appropriate to effectuate the orders of this Court against the Defendants, preserve its jurisdiction, and otherwise appropriately implement the rights declared.

(5) Issue an order finding that the enforcement of the State Partial Consent Decree adopting the Reed Buskey Plan is illegal and unconstitutional.

(6) Issue an order awarding to Plaintiffs and the class they represent their costs of

this action, including reasonable attorneys' fees and all expenses, pursuant to 42 U.S.C. § 1988.

Plaintiffs also pray for such other relief as may be just and proper.

Respectfully submitted this 2nd day of May, 1997.

/s/ Mark G. Montiel
Mark G. Montiel

MARK G. MONTIEL, P.C.
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Bernest Brooks
Coffee County Commissioner
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New Brockton, Alabama 36351

Rubin McKinnon
Coffee County Board of Education
101 Tiger Drive
Elba, Alabama 36323

Darryl Sinkfield
3746 Moss Wood Road
Montgomery, Alabama 36116

The Honorable James Bennett
Secretary of State
11 South Union Street
Montgomery, Alabama 36130

The Honorable Hal Smith
Lee County Justice Center
Opelika, Alabama 36801

The Honorable William H. Pryor Jr.
Attorney General
11 South Union Street
Montgomery, Alabama 36130

Plaintiff's Exhibit A

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON AND ANDREW HAYDEN on behalf of themselves and others similarly situated Plaintiffs, V. BILLY JOE CAMP, in his official capacity as Secretary of State of Alabama, Defendant.	)	CIVIL ACTION NO. 93-689-PR

PARTIAL CONSENT DECREE REGARDING LEGISLATIVE REDISTRICTING AND REQUIRING VOTING RIGHTS ACT PRECLEARANCE

(Filed May 11, 1993)

Plaintiffs Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon and Andrew Hayden and

defendant Secretary of State of the State of Alabama Billy Joe Camp, having submitted the following terms of settlement and for good cause shown, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Plaintiffs Sinkfield, Ross, Brooks, McKinnon and Hayden are hereby certified to represent a class of all African-American citizens of Alabama, pursuant to Rules 23(a) and 23 (b)(2), A.R.C.P.

2. The Court finds that, based on 1990 census data, the current districting plan for the election of members of the House and Senate of the Legislature of the State of Alabama prescribed by Act No. 83-154 would violate the rights of plaintiffs and the class they represent under the Constitution of the State of Alabama and the Fourteenth and Fifteenth Amendments to the U.S. Constitution and 42 U.S.C. Secs. 1973 and 1983 if used in the 1994 primary and general elections for the Alabama Legislature.

3. The Court further finds that the Legislature of the State of Alabama has failed to pass a redistricting plan for use in the 1994 primary and general elections for members of the Alabama Legislature which is based on the 1990 census and which meets the requirements of the Constitution of the State of Alabama and the Fourteenth and Fifteenth Amendments to the U. S. Constitution and 42 U.S.C. Secs. 1973 and 1983.

4. The Court concludes that the courts of Alabama have concurrent jurisdiction with federal courts to afford relief for violations of federal voting rights. *Hathorn v. Lovorn*, 457 U.S. 255 (1982). Authority to order judicial relief for violations of these federally protected rights is provided by 42 U.S.C. Sec. 1983.

5. The Court further concludes that, pursuant to fundamental principles of federalism in the United States, the courts of Alabama have the primary responsibility to order judicial relief if the Legislature of the State of Alabama fails to adopt a legislative redistricting plan that complies with the Constitution and laws of Alabama and the United States. *Growe v. Emison*, 113 S.Ct. 1075 (1993).

6. The Court hereby enters a declaratory judgement that, based on 1990 census data, the current districting plan for the election of members of the House and Senate of the Legislature of the State of Alabama prescribed by Act No. 83-154 will violate the rights of plaintiffs and the class they represent under the Constitution of the State of Alabama and the Fourteenth and Fifteenth Amendments to the U. S. Constitution and 42 U.S.C. Secs. 1973 and 1983 if used in the 1994 primary and general elections for members of the Alabama Legislature.

7. The Court finds that the legislative redistricting plan attached to this Decree as Exhibit A fully complies with all requirements of the laws and constitutions of Alabama and the United States, including one-person, one-vote requirements and the rights of the class of African-American citizens of Alabama to an equal opportunity to participate in the political process and elect candidates of their choice, which plan the Court hereby approves and adopts for use in the 1994 primary and general elections of members of the Alabama Legislature, subject to that plan receiving preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. Sec. 1973c.

8. Defendant Secretary of State Camp, his successors, officers, agents, attorneys, employees and those

acting in concert with him or at his direction are hereby ENJOINED as follows:

A. The Office of the Attorney General of the State of Alabama, as counsel for defendant Secretary of State Camp, shall within two weeks from the date of this Decree, make a formal submission of the redistricting plan approved herein to the appropriate federal authority for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. Sec. 1973c.

B. The Office of the Attorney General of the State of Alabama shall promptly report to this Court when it receives notice of objection or of no objection to the Section 5 submission.

C. If there is an objection to the Section 5 submission of the redistricting plan approved herein, the Court will conduct such additional proceedings as necessary to develop and adopt another plan that cures such objections.

D. Defendant, Secretary of State Billy Joe Camp, shall within three days after entry of this Partial Consent Decree issue a press release announcing the entry of said Decree and informing the public that the legislative redistricting plan announced therein is available for review at the Office of the Circuit Clerk of Montgomery County, Alabama. The Court hereby finds that this mandatory press release by the defendant satisfies the notice requirement of Rule 23(e), A.R.C.P.

E. The regularly scheduled 1994 primary and general elections for members of the Alabama Legislature shall be conducted according to the plan approved herein

by the Court and attached to this Decree as Exhibit A, subject to that plan having obtained Section 5 preclearance. Except as otherwise provided by this Decree, the elections shall be conducted as provided by Alabama law.

F. Subject to its having obtained Section 5 preclearance, the legislative redistricting plan approved herein shall be used for the conduct of all future elections for members of the Alabama Legislature until and unless the Legislature enacts a new and different plan that complies fully with all requirements of the laws and constitutions of Alabama and the United States, including Section 5 of the Voting Rights Act, or until data are available for redistricting according to the next federal decennial census.

G. Plaintiffs are the prevailing parties for purposes of an award of attorneys' fees and expenses. If after ninety days from the date of this decree the parties have been unable to reach agreement on the amount of said fees and expenses, plaintiffs may, within one-hundred and twenty days from the date of this decree, file an appropriate motion, and the Court will promptly schedule a hearing and determine the amount of an award of attorneys' fees and expenses.

H. The Court retains jurisdiction of this action and this Decree, for purposes of enforcement of the terms of the Decree and for such further and additional relief as may be equitable and just, until such time as the defendant submits evidence that a new redistricting plan for the Alabama Legislature meeting all the requirements of the Constitution and laws of Alabama and the United

States has been adopted pursuant to Alabama law and has received preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c.

DONE this 12 day of May, 1993.

/s/ Charles Price

CIRCUIT JUDGE,
MONTGOMERY COUNTY

SUBMITTED BY:

JAMES H. EVANS
ATTORNEY GENERAL

/s/ James U. Blacksher
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Attorneys for Plaintiffs

Plaintiff's Exhibit B

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON AND ANDREW HAYDEN on behalf of themselves and others similarly situated	)	
Plaintiffs,	)	CIVIL ACTION NO. 93-689-PR
V.	)	
BILLY JOE CAMP, in his official capacity as Secretary of State of Alabama,	)	
Defendant.	)	

JOINT MOTION FOR APPROVAL OF PARTIAL CONSENT DECREE REGARDING LEGISLATIVE REDISTRICTING

(Filed May 11, 1993)

Plaintiffs Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon and Andrew Hayden and defendant Secretary of State Billy Joe Camp, through undersigned counsel, jointly move the Court to approve the Partial Consent Decree attached hereto.

Respectfully submitted this 11th day of May, 1993.

Plaintiff's Exhibit C

is being
lodged separately
with the Court

Plaintiff's Exhibit D

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON AND ANDREW HAYDEN, on behalf of themselves and others similarly situated,	)	CIVIL ACTION NO. CV-93-689-PR
Plaintiffs,	)	
v.	)	
JIM BENNETT, in his official capacity as Secretary of State of Alabama,	)	
Defendant.	)	

FINAL JUDGMENT
CONCERNING LEGISLATIVE REDISTRICTING

On May 12, 1993, this Court tentatively approved a consent decree redistricting both houses of the Alabama Legislature subject to the plan receiving preclearance under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. On July 28, 1993, the Office of the Attorney General of Alabama filed evidence that the Acting Assistant Attorney General of the United States had issued written notice that he did not object to the consent decree redistricting plan under section 5 of the voting Rights Act.

The Court has considered the motions to intervene filed by Robert W. Avery, Claud Walker, and T.D. Little, and the motion to file as amicus curiae by Pete Turnham, and has heard the arguments of counsel in relation to

these motions. The Court is of the opinion that the motions to intervene are without merit and should be denied.

The Court finds that the plan proposed by the parties meets all requirements of the constitutions of the United States and of the State of Alabama, and that the implementation of this plan is in the best interests of all the citizens of the State of Alabama.

Pursuant to Rule 54(b), A.R.C.P., this Court determines that there is no just reason for delaying entry of final judgment with respect to the legislative redistricting issues in this action.

Accordingly, it is ORDERED, ADJUDGED AND DECREED as follows:

A. The motions to intervene filed by Robert W. Avery, Claud Walker, and T.D. Little are hereby DENIED.

B. The Partial Consent Decree Regarding Legislative Redistricting and Requiring Voting Rights Act Preclearance tentatively approved by the Court on May 12, 1993, is hereby FINALLY APPROVED.

C. Pursuant to Rules 54(b) and 58, A.R.C.P., this order constitutes FINAL JUDGMENT with respect to all

issues in this action concerning redistricting of the Alabama Legislature.

DONE this 13 day of August, 1993.

/s/ Charles Price
CIRCUIT JUDGE, MONTGOMERY COUNTY

cc: Robert L. Avery
T.D. (Ted) Little
George Azar, Esq.
James U. Blacksher
Solomon S. Seay, Jr., Esq.
Edward Still
James H. Evans, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

JOHN RICE AND CAMILLA L. RICE, individually and on behalf of a class of non-African-American voters,	)	
Plaintiffs,	)	Case No.
v.	)	97-A-715-E
HAL SMITH, in his official capacity as Probate Judge of Lee County, Alabama, and JAMES BENNETT, in his official capacity as Secretary of State	)	

of Alabama, and DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, and ANDREW HAYDEN, individually and on behalf of African-American voters, STATE OF ALABAMA,

Defendants.

VERIFICATION OF COMPLAINT

(Filed May 2, 1997)

Camilla L. Rice, who, being first duly sworn, states that she has read the Verified Complaint and knows the contents thereof, and that the facts set forth therein are true and correct to the best of her knowledge, information and belief.

/s/ Camilla L Rice
Camilla L. Rice
Plaintiff

SWORN AND SUBSCRIBED to me this 2nd of May, 1997.

/s/ Joi T. Montiel
Notary Public
My Commission Expires:
2-11-2001

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

JOHN RICE AND CAMILLA L. RICE, individually and on behalf of a class of non-African-American voters, Plaintiffs, v. HAL SMITH, in his official capacity as Probate Judge of Lee County, Alabama, and JAMES BENNETT, in his official capacity as Secretary of State of Alabama, and DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, and ANDREW HAYDEN, individually and on behalf of African-American voters, STATE OF ALABAMA, Defendants.	)	Case No. 97-T-715-E

VERIFICATION OF COMPLAINT

John L. Rice, who, being first duly sworn, states that she has read the Verified Complaint and knows the contents thereof, and that the facts set forth therein are true and correct to the best of his knowledge, information and belief.

/s/ John Rice
John Rice
Plaintiff

SWORN AND SUBSCRIBED to me this 2nd day of May, 1997.

/s/ Joi T. Montiel
Notary Public
My Commission Expires:
2-11-2001

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

JOHN RICE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Civil Action No.
	)	97-A-715-E
HAL SMITH, et al.,	)	
	)	
Defendants.	)	

ORDER

(Filed Aug. 14, 1997)

There is presently pending in this cause the Sinkfield defendants' motion to dismiss filed herein on July 10, 1997. On July 31, 1997, the plaintiffs filed a response to the Sinkfield defendants' motion. Additionally, on August 14, 1997, the court heard oral argument on the motion.

After reviewing the partial consent decree and the final judgment entered by the state court in *Sinkfield, et al. v. Bennett*, Civil Action No. CV-93-689-PR, it appears to the court that the state court retained jurisdiction of its action and the decree. *See* paragraph 8.H. of the Partial Consent Decree filed on May 11, 1993. Accordingly, this court, based on principles of federalism, deems it prudent to defer acting until the plaintiffs first have an opportunity to intervene in the state court action. *See Growe v. Emison*, 507 U.S. 25 (1993). Therefore, upon consideration of those matters contained in the Sinkfield defendants' motion to dismiss, the plaintiffs' response thereto, and for good cause shown, it is the

ORDER, JUDGMENT and DECREE of this court:

(1) That this court defer ruling on the pending motion to dismiss;

(2) That within fifteen (15) days from the date of this order the plaintiffs are directed to file a motion to intervene in the state court action of *Sinkfield, et al. v. Bennett*, Civil Action No. CV-93-689-PR;

(3) That in the event the state, court either denies the plaintiffs' motion to intervene or declines to act within thirty (30) days from the date of its filing, this court will revisit this case and reset this matter for a hearing as soon as practicable; and

(4) The plaintiffs are directed to file a motion in this court within fifteen (15) days from the date of this order requesting leave to add additional party plaintiffs.

DONE this the 14th day of August, 1997.

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

/s/ Myron H. Thompson
CHIEF UNITED STATES DISTRICT JUDGE

/s/ W. Harold Albritton
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

JOHN RICE and CAMILLA L. RICE, etc.,	)	
Plaintiffs,	)	CIVIL ACTION NO.
vs.	)	97-A-715-E
HAL SMITH, etc., et al.,	)	
Defendants.	)	

ORDER

(Filed Sep. 23, 1997)

This case is before the court on the Plaintiffs' Request for Reconsideration of this court's order of August 14, 1997.

The Request for Reconsideration was filed on August 28, 1997. On the same day, without asking this court to stay its August 14 order pending determination of the Request for Reconsideration, the Plaintiffs, pursuant to the order, filed a Motion to Intervene and a Complaint in Intervention in the case of *Sinkfield, et al. v. Camp*, CV-93-689-PR, in the Circuit Court of Montgomery County, Alabama. The Motion to Intervene was granted by the state court on September 4, 1997. The Plaintiffs have now filed in state court a Motion to Dismiss and Amended Motion to Dismiss their Complaint in Intervention. The Defendants have opposed dismissal of the Intervention without order of the state court.

At the time the Circuit Court of Montgomery County approved the consent decree in 1993 establishing a plan

for reapportionment of the Alabama Legislature, the Supreme Court of the United States had not issued its decision in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), followed by *United States v. Hayes*, 115 S.Ct. 2431 (1995), *Bush v. Vera*, 116 S.Ct. 1941 (1996), *Miller v. Johnson*, 115 S.Ct. 2475 (1996), *Shaw v. Hunt*, 116 S.Ct. 1894 (1996), and *Abrams v. Johnson*, 117 S.Ct. 1925 (1997), which cases held certain race-based districting to be unconstitutional. Since it is the law established in these later cases that the Plaintiffs contend is violated by the 1993 consent decree, this court determined it to be prudent, and in the furtherance of the doctrine of federalism, for the state court which approved the decree to now be given an opportunity to further consider the constitutionality of the decree in light of current law.

Whether this court was right or wrong in its August 14 order is not material now. The fact remains that there is currently an ongoing state court action, albeit one from which the Plaintiffs now seek to withdraw. That being the case, the court declines to reconsider its order at this time, but will allow the state court to proceed with consideration of the matters before it. It may be that the state court will grant the Plaintiffs' Motion to Dismiss, so that the Plaintiffs are no longer parties to the case in that court. If so, the court will then look anew at the Request for Reconsideration. If not, this court will stay its hand for a reasonable time to allow a determination to be made by the state court as to the constitutionality of the reapportionment plan contained in the 1993 consent decree, in light of later Supreme Court decisions.

This court emphasizes that it does not disclaim jurisdiction over this case; jurisdiction exists. In the absence of

expeditious resolution of the issues by the state court, it will be exercised.

It is hereby ORDERED as follows:

1. This case is set for hearing on Wednesday, November 26, 1997, at 9:00 a.m. In the event the issue of the constitutionality of the 1993 consent decree has not been resolved by the state court at that time, this court will hear evidence and will proceed on the merits.

2. A pretrial conference is scheduled before Judge Albritton on Wednesday, November 12, 1997, at 8:15 a.m.

3. The parties are DIRECTED to file with the court, for information purposes, copies of all pleadings and other documents which they file in the state court proceedings, together with copies of all orders entered by the state court.

DONE this 23rd day of September, 1997.

/s/ Joel F. Dubina
JOEL F. DUBINA
UNITED STATES CIRCUIT JUDGE

/s/ Myron H. Thompson
MYRON H. THOMPSON
UNITED STATES DISTRICT JUDGE

/s/ W. Harold Albritton
W. HAROLD ALBRITTON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

JOHN RICE AND CAMILLA L. RICE, individually and on behalf of a class of non-African-American voters Plaintiffs, v. HAL SMITH, in his official capacity as Probate Judge of Lee County, Alabama, and JAMES BENNETT, in his official capacity as Secretary of State of Alabama, and DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, and ANDREW HAYDEN, individually and on behalf of African-American voters, and STATE OF ALABAMA, Defendants.	)	Case No. 97-A-715-E

FIRST AMENDMENT TO VERIFIED COMPLAINT

(Filed Oct. 15, 1997)

Plaintiffs John Rice and Camilla L. Rice hereby amend their Verified Complaint by adding the following additional parties and allegations:

ADDITIONAL PARTIES

1. Plaintiff Andrew D. Thompson, Jr. is an adult resident citizen of Macon County, Alabama and is a registered voter of the State of Alabama. He is a resident of and registered voter in Alabama Senate District 28 and Alabama House of Representatives District 82, which were established by the State Partial Consent Decree entered in *Sinkfield v. Camp*, (CV-93-689-PR, May 12, 1993). He is asserting his own rights as well as the rights of a class of registered voters and citizens of the State of Alabama who are not African-American or black.

2. Plaintiff Peggy C. Kelley is an adult resident of Autauga County, Alabama and is a registered voter of the State of Alabama. She is a resident of and registered voter in Alabama Senate District 30 and Alabama House of Representatives District 88, which were established by the State Partial Consent Decree entered in *Sinkfield v. Camp*, (CV-93-689-PR, May 12, 1993). She is asserting her own rights as well as the rights of a class of registered voters and citizens of the State of Alabama who are not African-American or black.

3. Plaintiff Gonzalo F. Montiel is an adult resident of Mobile County, Alabama and is a registered voter of the State of Alabama. He is a resident of and registered voter in Alabama Senate District 34 and Alabama House of Representatives District 101, which were established by the State Partial Consent Decree entered in *Sinkfield v. Camp*, (CV-93-689-PR, May 12, 1993). He is asserting his own rights as well as the rights of a class of registered voters and citizens of the State of Alabama who are not African-American or black.

4. Plaintiff Ann G. Hunter is an adult resident of Montgomery County, Alabama and is a registered voter of the State of Alabama. She is a resident of and registered voter in Alabama Senate District 25 and Alabama House of Representatives District 75, which were established by the State Partial Consent Decree entered in *Sinkfield v. Camp*, (CV-93-689-PR, May 12, 1993). She is asserting her own rights as well as the rights of a class of registered voters and citizens of the State of Alabama who are not African-American or black.

5. Plaintiff Daniel P. Brown is an adult resident of Montgomery County, Alabama and is a registered voter of the State of Alabama. He is a resident of and registered voter in Alabama Senate District 25 and Alabama House of Representatives District 73, which were established by the State Partial Consent Decree entered in *Sinkfield v. Camp*, (CV-93-689-PR, May 12, 1993). He is asserting his own rights as well as the rights of a class of registered voters and citizens of the State of Alabama who are not African-American or black.

6. Plaintiff W. Ricardo Montiel, M.D., is an adult resident of Tuscaloosa County, Alabama and is a registered voter of the State of Alabama. He is a resident of Alabama Senate District 21 and Alabama House of Representatives District 63, which were established by the State Partial Consent Decree entered in *Sinkfield v. Camp*, (CV93-689-PR, May 12, 1993). He is asserting his own rights as well as the rights of a class of registered voters and citizens of the State of Alabama who are not African-American or black.

7. Plaintiff Karen D. Outlaw is an adult resident of Pike County, Alabama and is a registered voter of the State of Alabama. She is a resident of and registered voter in Alabama Senate District 30 and Alabama House of Representatives District 89, which were established by the State Partial Consent Decree entered in *Sinkfield v. Camp*, (CV-93-689-PR, May 12, 1993). She is asserting her own rights as well as the rights of a class of registered voters and citizens of the State of Alabama who are not African-American or black.

8. Plaintiff Kelly Brasher is an adult resident of Shelby County, Alabama and is a registered voter of the State of Alabama. She is a resident of and registered voter in Alabama Senate District 14 and Alabama House of Representatives District 41, which were established by the State Partial Consent Decree entered in *Sinkfield v. Camp*, (CV-93-689-PR, May 12, 1993). She is asserting her own rights as well as the rights of a class of registered voters and citizens of the State of Alabama who are not African-American or black.

AMENDED SECOND CAUSE OF ACTION

EQUAL PROTECTION

Racial Gerrymander

9. Plaintiffs reallege and incorporate by reference herein each and every allegation of the Verified Complaint and paragraphs 1 through 8 above.

10. The shape of Senate Districts 14, 21, 25, 28, 30, 34 and House Districts 41, 63, 73, 75, 82, 88, 89, 101 are so "bizarre," as to amount to a racial classification under

Shaw v. Hunt, 116 S.Ct. 1894 (1996), *Miller v. Johnson*, 115 S.Ct. 2475 (1995), *Bush v. Al Vera*, 116 S.Ct. 1941 (1996) and *United States v. Hayes*, 115 S.Ct. 2431 (1995) which is constitutionally impermissible.

11. Plaintiffs allege that race was the "predominant factor" in drawing these district lines without consideration given to traditional redistricting factors such as compactness, contiguity, and respect for political subdivisions. These districts are so bizarre that the boundaries of these districts cannot be explained on any grounds other than race. Therefore, these districts are presumptively unconstitutional, and cannot be justified by the court ordering it established by reference to any compelling State interest.

AMENDMENT TO PARAGRAPH 30

12. Paragraph 30 is amended to reflect that the reference to District 93 was a typographical error and that the correct reference should have been to District 83.

AMENDED PRAYER FOR RELIEF

13. Plaintiffs pray that this Court render judgment against the Defendants and provide the following relief:

(1) Issue an Order declaring that it is unconsitutional for the Defendants to enforce the single member election districts established in the Consent Decree in Sinkfield, especially the boundaries of Senate Districts 14, 21, 25, 28, 30, 34 and House Districts 41, 63, 73, 75, 82, 88, 101 and further declaring the Consent Decree to be contrary to law and of no further force or effect.

(2) Issue an order redrawing the boundaries of the single member election districts for the Alabama Senate and House of Representatives with consideration to traditional districting principles and in accordance with Equal Protection and the "one man, one vote" principles.

(3) Issue such other preliminary and permanent injunctive relief as may be appropriate to effectuate the orders of this Court against the Defendants, preserve its jurisdiction, and otherwise appropriately implement the rights declared.

(4) Issue an order finding that the enforcement of the Partial Consent Decree adopting the Reed Buskey Plan is illegal and unconstitutional.

(5) Plaintiffs also pray for such other relief as may be just and proper.

Respectfully submitted this 29th day of August, 1997.

/s/ Mark G. Montiel
Mark G. Montiel

OF COUNSEL:
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8650 Minnie Brown Road
Montgomery, Alabama 36117
(334-215-1445)

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing on all counsel of record by mailing the same by United States Mail, postage prepaid and properly addressed as follows on this the 29th day of August, 1997.

The Honorable William H. Pryor, Jr.
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/s/ Mark G. Montiel
OF COUNSEL

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JOHN RICE AND CAMILLA L. RICE, individually and on behalf of a class of non-African-American voters	*	
Plaintiffs,	*	
v.	*	**Case No. 97-A-715-E**
HAL SMITH, in his official capacity as Probate Judge of Lee County, Alabama, and **JAMES BENNETT**, in his official capacity as Secretary of State of Alabama, and **DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON**, and **ANDREW HAYDEN**, individually and on behalf of African-American voters, and **STATE OF ALABAMA,**	*	
Defendants.	*	

SECOND AMENDMENT TO VERIFIED COMPLAINT

(Filed Oct. 15, 1997)

Plaintiffs John Rice and Camilla L. Rice hereby amend their Verified Complaint by adding the following additional parties and allegations:

ADDITIONAL PARTIES

1. Plaintiff Bibb Gunter is an adult resident citizen of Houston County, Alabama and is a registered voter of the State of Alabama. He is a resident of and registered voter in Alabama Senate District 29 and Alabama House of Representatives District 86, which were established by the State Partial Consent Decree entered in *Sinkfield v. Camp*, (CV-93-689-PR, May 12, 1993). He is asserting his own rights as well as the rights of a class of registered voters and citizens of the State of Alabama who are not African-American or black.

AMENDED SECOND CAUSE OF ACTION

EQUAL PROTECTION

Racial Gerrymander

2. Plaintiff realleges and incorporates by reference herein each and every allegation of the Verified Complaint, First Amended Complaint, and paragraph 1 above.

3. The shape of Senate District 29 and House District 86 are so "bizarre", as to amount to a racial classification under *Shaw v. Hunt*, 116 S.Ct. 1894 (1996), *Miller v. Johnson*, 115 S.Ct. 2475 (1995), *Bush v. Al Vera*, 116 S.Ct. 1941 (1996) and *United States v. Hayes*, 115 S.Ct. 2431 (1995) which is constitutionally impermissible.

4. Plaintiff alleges that race was the "predominant factor" in drawing these district lines without consideration given to traditional redistricting factors such as compactness, contiguity, and respect for political subdivisions. These districts are so bizarre that the boundaries of

these districts cannot be explained on any grounds other than race. Therefore, these districts are presumptively unconstitutional, and cannot be justified by the court ordering it established by reference to any compelling State interest.

AMENDED PRAYER FOR RELIEF

5. Plaintiff prays that this Court render judgment against the Defendants and provide the following relief:

(1) Issue an Order declaring that it is unconstitutional for the Defendants to enforce the single member election districts established in the Consent Decree in *Sinkfield*, especially the boundaries of Senate District 29 and House District 86 and further declaring the Consent Decree to be contrary to law and of no further force or effect.

(2) Plaintiff also prays for such other relief as may be just and proper.

Respectfully submitted this 8 day of September, 1997.

/s/ Kathleen A. Brown
Kathleen A. Brown

OF COUNSEL:
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(334-215-1445)

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing on all counsel of record by mailing the same by United States Mail, postage prepaid and properly addressed as follows on this the 8 day of September, 1997.

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/s/ Kathleen A. Brown
OF COUNSEL

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY ALABAMA

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON AND ANDREW HAYDEN on behalf of themselves and others similarly situated,	)	Civil Action No. 93-689-PR
Plaintiffs,	)	
JOHN RICE AND CAMILLA L. RICE	)	
Plaintiff-Intervenors	)	
v.	)	
JAMES BENNETT, in his official capacity as Secretary of State of Alabama,	)	
Defendant.	)	

ORDER

(Filed Nov. 20, 1997)

I. BACKGROUND

This action was originally filed on March 30, 1993 by Plaintiffs Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon and Andrew Hayden, on behalf of themselves and the class of African-American citizens of Alabama after the Alabama Legislature failed to reapportion itself as required by the Alabama Constitution, 1901, following the results of the 1990 federal decennial census. On May 12, 1993, this court tentatively approved a Partial Consent Decree regarding Legislative Redistricting and

Requiring Voting Rights Act Preclearance. On August 13, 1993, this court gave final approval of the redistricting plan (herein after called Consent Decree Plan) which had been precleared by the Attorney General of the United States.

Issues regarding the Consent Decree Plan have once again been placed before the court as a result of a complaint-in-intervention filed by John Rice and Camilla Rice. The Rices filed the action with this court after having been directed to do so by a federal three-judge court in the case of *Rice v. Smith,* CA No. 97-A-715-E (M.D. Ala.). The Rices have presented three basic contentions for resolution:

1) Plaintiff-intervenors contend that their one-person, one-vote rights under the Equal Protection Clause of the Fourteenth Amendment are violated because one district in the Consent Decree Plan, House District 92, is underpopulated by 5.21%, creating a total population deviation in the House plan of 10.20%;

2) Plaintiff-intervenors further contend that the Consent Decree Plan approved by this court contains districts which are unconstitutional racial gerrymanders under cases of *Shaw v. Reno,* 509 U.S. 630 (1993), *Miller v. Johnson,* 115 S.Ct. 2475 (1995); *Shaw v. Hunt,* 116 S.Ct. 1894 (1996) (*"Shaw II"*); *Bush v. Vera,* 116 S.Ct. 1941 (1996).

3) Plaintiff-intervenors also contend that six majority black Senate districts and nineteen majority black House districts were designed intentionally to overpopulate majority white districts and thereby to dilute the voting strength of white voters.

II. JURISDICTION

This court reaffirms its reliance upon the pronouncements of *Growe v. Emison*, 113 S.Ct. 1075 (1993) as it did in 1993, and concludes, once again, pursuant to the fundamental principles of federalism in the United States, the courts of Alabama have the primary responsibility to order judicial relief if the Legislature of the State of Alabama fails to adopt a legislative redistricting plan that complies with the Constitution and laws of Alabama and the United States. *Brooks v. Hobbie*, 631 So.2d 883, 890 (Ala. 1993).

In 1993 a federal three-judge court recognized that it was appropriate to give judges elected by the people of Alabama the opportunity to resolve the issues presented in this case. Today, the federal court has once again, in its wisdom, directed that the state judiciary resolve the issues before it.

In this court's order dated May 12, 1993, jurisdiction of this case was specifically retained as stated in paragraph 8 (H), and an injunction was put in effect which has not been dissolved. It can be stated in no clearer terms, but the court will recite it again at this juncture: *The Court retains jurisdiction of this action and this Decree and for such further and additional relief as may be equitable and just, until such time as the defendant submits evidence that a new redistricting plan for the Alabama Legislature meeting all the requirements of the Constitution and laws of Alabama and the United States has been adopted pursuant to Alabama law and has received preclearance under Section 5 of the Voting Right Act, 42 U.S.C. Section 1773c.*

The court is also mindful that the three-judge court in *Rice v. Smith* has urged this court to discharge its responsibility on or before November 26, 1997, or it would assume responsibility for resolving claims raised by plaintiff-intervenors John Rice and Camilla Rice. Federal intervention into this state matter will not now be necessary with the rendering of this decision.

With the backdrop of the directive of the three-judge court and the upcoming elections in 1998 for the Alabama Legislature, this court set a rigorous, but fair discovery, motion and trial schedule so this case could be decided before November 26, 1997. The trial lasted slightly less than 3 days. The court finds that the parties were all well prepared and were given an opportunity to present all evidence they desired to present. The court further finds that neither was prejudiced by the abbreviated schedule.

III. PENDING MOTIONS

Several motions were carried with the case and made at the conclusion of the presentation of evidence. The court makes the following rulings on the pending motions:

a) State Defendant Bennett's renewed Motion for Judgment on the grounds of laches. The court is extremely impressed with the State Defendant's argument and evidence on laches. But for the fact that major pronouncements from the United States Supreme Court have been handed down since the approval of the Consent Decree Plan, this court would reach a different result. The court will rule on the constitutionality of the

Consent Decree Plan in view of those cases. MOTION DENIED.

b) State Defendant Bennett's Motion for Order to Show Cause why the Sinkfield Defendants should not be dismissed and the class decertified for lack of standing. MOTION DENIED.

c) State Defendant Bennett's Motion to Dismiss the Vote Dilution Claims of Camilla Rice on the grounds that she lives in a majority black district that is overpopulated by more than 4% and has not suffered any dilution as a result. MOTION GRANTED.

d) State Defendant Bennett's Motion to Dismiss the Vote Dilution Claims of John Rice in part, insofar as one has standing to challenge vote dilution only as to a district in which he or she resides. MOTION GRANTED.

e) State Defendant Bennett's Motion to limit the *Shaw* challenge of John Rice and Camilla Rice to the districts in which they reside, namely, House Districts 79 and 83 and Senate Districts 27 and 28. MOTION GRANTED.

f) Motion of Plaintiff-intervenors John Rice and Camilla Rice to dismiss cross-claim of Sinkfield plaintiffs. MOTION GRANTED.

g) Sinkfield plaintiff motion to certify subclass of politically organized black citizens who are members of the Alabama Democratic Conference, the Alabama New South Coalition and the Jefferson County Coalition. MOTION DENIED.

All other motions not previously addressed are hereby DENIED.

IV. DISCUSSION

The Alabama Legislature has a history of being unable to reapportion itself as required by the Alabama Constitution, without court intervention. While the Legislature passed a plan in 1983, it did so under the watchful eye and direction of the federal court. The Consent Decree Plan was approved by this court in 1993 after the full Legislature again failed to adopt a plan to reapportion itself following results of the 1990 federal census. The plan was approved after a class of black citizens filed this action and negotiated with elected officials of the State of Alabama for the plan. Those elected officials, former Secretary of State Billy Joe Camp and former Attorney General James Evans represented to this court, through counsel, that approval of this plan was in the best interest of the people of Alabama.

The court finds that the Consent Decree Plan was drawn without any directives or influence of the U.S. Attorney General or the U.S. Department of Justice to create majority black districts or black influence districts. The court also finds that there is no constitutional violation as found in the cases of *Shaw v. Reno*, 509 U.S. 630 (1993), *Miller v. Johnson*, 115 S.Ct. 2475 (1995); *Shaw v. Hunt*, 116 S.Ct. 1894 (1996) (*"Shaw II"*); *Bush v. Vera*, 116 S.Ct. 1941 (1996); *Abrams v. Johnson*, 117 S.Ct. 1925 (1997).

In the Alabama House of Representatives, 78 of the 105 districts, or 74.3%, are majority white. In the Senate, 27 of the 35 districts, or 77.1%, are majority white. Whites make up 73.6% of Alabama's total population. By comparison, in the House of Representatives 27 of the 105 districts, or 25.7% are majority black. In the Senate, 8 of

the 35 districts, or 22.9% are majority black. Blacks make up 25% of Alabama's total population. Thus, blacks and whites are proportionately represented in the Alabama Legislature. No other state, with a significant minority population, can boast of such a distinction when it comes to equitable representation of all of its citizens in the halls of state legislatures. While other states are talking philosophically about diversity in government, the Alabama Legislature is one area where the State of Alabama has taken the lead on becoming more diverse and representative of its people.

The chief architect of the Consent Decree Plan was Dr. Joe L. Reed, along with House Representative John Buskey, who is deceased. The great weight of evidence before the court shows that race was not the predominant factor in drafting the plan and that traditional districting principles were not subordinated to considerations of race. The evidence shows that the plan was clearly the result of political negotiation and compromise. The Consent Decree Plan could not have been drawn and presented without the full support of the Speaker of the House, Jimmy Clark, who is white. The testimony shows that Speaker Clark engineered passage of the plan through the House of Representatives, where it passed with only one change. The testimony also shows that the plan received wide-spread support in the House, including Representatives Perry Hooper, Bill Fuller and Jane Gullatt. The plan was killed before it could pass in the Senate. As noted above, the Secretary of State and the Attorney General also negotiated and supported the plan. While the plan created several new majority black districts, it also created several new Republican districts.

When the Alabama Legislature failed to reapportion itself in 1993, any citizen, black or white, could have filed this action. This action was filed by the Sinkfield plaintiffs, who represent a class of black citizens. The fact that the action was filed by black citizens and the Consent Decree Plan negotiated by representatives of black citizens does not make the plan inherently suspect. Blacks have the constitutional right under the First, Thirteenth, Fourteenth, and Fifteenth Amendments to associate politically and negotiate with the State of Alabama, through their leaders, for whatever type districts best represent their political interests in the Alabama Legislature, as long as the districts do not violate the constitutional rights of white citizens. The court finds that the Consent Decree Plan as drawn, specifically the challenged districts, does not violate the constitutional rights of the Rice plaintiff-intervenors or of white citizens of this State.

The chief negotiator for black citizens was Dr. Joe L. Reed, chairman of the Alabama Democratic Conference. Reed consulted with Richard Arrington and Hank Sanders who are leaders of the Jefferson County Coalition and the Alabama New South Coalition. These three organizations represent the political interests of over 80% of the black voters in Alabama. The chief negotiators for the State of Alabama were Secretary of State Billy Joe Camp, Attorney General James Evans and Speaker of the House Jimmy Clark. These elected officials, in addition to members of the House of Representatives, represent a majority of all voters in Alabama. The undeniable fact is that the Consent Decree Plan most closely represents any plan that could receive support from a majority of white voters of Alabama through elected officials, and black voters

through representatives who represent their political interests. The court does not deem it appropriate for it to substitute its judgment for that of the people of Alabama, acting through their respective representatives in drafting a reapportionment plan where the evidence overwhelmingly shows that the plan was the result of political negotiations, that race was not a predominant factor and was not subordinated to race-neutral traditional districting principles of respecting communities of interest, contiguity, compactness, and incumbency in Lee County. See, *Gafney v. Cummings*, 412 U.S. 735, 753 (1973).

The court finds that the vacillating defense of the Consent Decree Plan by the State Defendant Bennett is unusual. On the one hand, Defendant Bennett argues that the plan is constitutional and the plaintiff-intervenors are entitled to no relief. On the other hand, State Defendant Bennett argues that if strict scrutiny applies, the court should redraw districts in Lee County. The court notes that the State Defendant Bennett relied completely upon the evidence put on by the Sinkfield plaintiffs to the extent that the State defended the plan as constitutional.

As to the State's position that the plan is constitutional, the State contends that the plaintiff-intervenors have failed to prove that race predominated over other traditional districting criteria in drawing the house and senate districts in Lee County, therefore the Rices' gerrymandering claim should be denied. The court agrees and finds that race was not the predominant factor over other traditional districting criteria and was not used as a proxy for political characteristics. Therefore strict scrutiny is not applicable and does not come into operation.

Plaintiff John Rice, a former member of the legislature, was familiar with the plan in 1993. Rice chose not to run under the Consent Decree Plan. He testified that one of his motivations in filing this action in 1997 was his dissatisfaction with the legislative delegation which refused to support a referendum to combine the positions of tax collector and tax assessor to that of revenue commissioner in Lee County. He also testified that he filed suit because Lee County was split among 5 house districts and 3 senate districts and he wanted to see Lee County put back together again. His motive was not, he testified, to reduce the number of majority black districts. Rice's concerns here do not make the plan suspect requiring the application of strict scrutiny, nor do his concerns rise to the level of a constitutional violation.

V. REQUEST FOR PRELIMINARY INJUNCTION

In order to issue a preliminary injunction, the court must be satisfied that the plaintiff (here the plaintiff-intervenors) meet all of the following four prerequisites: (1) that there is a substantial likelihood of success on the merits; (2) that without the relief there will be irreparable injury; (3) that the threatened injury to the plaintiff-intervenors outweighs any threatened harm to the defendant; and (4) that the public interest will not be served by granting the injunctive relief. *Massey v. Disc. Mfg., Inc.*, 601 So.2d 449 (Ala. 1994).

1. Substantial Likelihood of Success on the Merits

A. Rice Intervenors' One-Person, One-Vote Claim

The Rice Intervenors contend that their one-person, one-vote rights under the Equal Protection Clause of the Fourteenth Amendment are violated because one district in the Consent Decree Plan, House District 92, is under-populated by 5.21%, creating a total population deviation in the House plan of 10.20%, in excess of the plus or minus 5% (and overall 10%) deviation policy followed by the State of Alabama. Plaintiff-intervenors' evidence on this issue consisted simply of pointing to the obvious numbers contained in the plan. There was no evidence presented that the 5.21% deviation in Covington County caused them any injury. House District 92 contains all of Covington County and is limited to only Covington County. It is the only district in the entire Consent Decree Plan that exceeds a plus or minus 5% deviation.

Guidelines of the Reapportionment Committee of Alabama provide that the state, in drawing legislative districts is permitted a deviation from the ideal population size of plus or minus 5% or an overall deviation of 10%. It has been held, however, that Alabama can justify deviations greater than plus or minus 5% for the sake of furthering its policy of preserving county integrity so long as it does not "result . . . in a total subversion of the equal population principle in that legislative body. *Reynolds v. Sims*, 377 U.S. 533, 581 (1964); *Also see, Brown v. Thomson*, 462 U.S. 835 (1983) (approving plan where giving Wyoming's smallest county its own district made it 60% below the ideal population); *Mahan v. Howell*, 410

U.S. 315 (1973) (approving Virginia's legislative redistricting plan with a 16.4% maximum deviation); *accord*, *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993). The Constitution of Alabama, 1901, §§ 198, 200 provides the state policy of avoiding the splitting of counties in legislative redistricting plans, where it is possible and appropriate.

The Court finds that the 5.21% deviation in District 92 which includes and is limited to Covington County, and the overall deviation of 10.21% in House Plan does not violate plaintiff-intervenors' one-person, one vote under the Fourteenth Amendment. Consequently, plaintiff-intervenors cannot prevail on the merits of this claim.

B. Rice-Intervenors' Racial Gerrymander Claim

Next, the Rice Intervenors claim that the Consent Decree Plan approved by this court contains districts which are so "bizarre," and the racial make-up of the districts so heavily weighted in favor of black citizens as to amount to an unconstitutional racial gerrymander under cases of *Shaw v. Reno*, 509 U.S. 630 (1993), *Miller v. Johnson*, 115 S.Ct. 2475 (1995); *Shaw v. Hunt*, 116 S.Ct. 1894 (1996) (*"Shaw II"*); *Bush v. Vera*, 116 S.Ct. 1941 (1996). This court has limited the racial gerrymander claim of Plaintiff-intervenors John Rice and Camilla Rice under *Shaw* to the districts in which they reside, namely, House Districts 79 and 83 and Senate Districts 27 and 28. *United States v. Hays*, 515 U.S. 737, 115 S.Ct. 2431, 2436 (1995).

To establish a claim that House Districts 79 and 83 and Senate Districts 27 and 28 violate *Shaw*, the Rice

intervenors must demonstrate that race was the "predominant purpose" for their boundaries. *Miller v. Johnson*, 115 S.Ct. 2475, 2488 (1995). "Predominant" means race has become the "dominant and controlling" consideration. *Shaw II*, 116 S.Ct. at 1900 (citations omitted); *Bush v. Vera*, 116 S.Ct. at 1951. It means that traditional, race-neutral districting criteria have been "subordinated" to the racial interest. *Bush v. Vera*, 116 S.Ct. at 1951.

The U.S. Supreme Court has articulated the burden of proof that the plaintiffs must meet and have given specific guidance as to the consideration of race and traditional race-neutral districting principles.

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, or racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines."

Miller, ___ U.S. ___, 115 S.Ct. at 2488, (*quoting Shaw I*, 509 U.S, at 647, 113 S.Ct. at 2826-27). If race is shown to have been the "predominant purpose", the burden shifts to the state to demonstrate that the districts can survive strict

scrutiny, that is, that they are narrowly tailored to serve a compelling state interest. *Miller,* 115 S.Ct. at 2490.

Both State Defendant Bennett and the Sinkfield plaintiffs contend that the Rice Intervenors have failed to establish that race was the "predominant purpose" in drafting the challenged districts. The court agrees and finds that the evidence establishes that consideration of "race" did not predominate over traditional districting principles in drawing of House Districts 79 and 83 and Senate Districts 27 and 28. The evidence shows that the drafting of the challenged districts was the result of political negotiations and compromise. In addition, there was no influence or input by the United States Attorney General or the U. S. Justice Department in the drafting of these districts. The plaintiff-intervenors cannot prevail on the merits of establishing a *Shaw* claim.

The primary architect of the Consent Decree Plan was Dr. Joe Reed who has considerable experience in drafting reapportionment plans. John Buskey, who is deceased, was also a drafter of the plan. Dr. Reed testified that it was his intent to draw majority black districts and majority white districts for the legislature and that one cannot draw a reapportionment without race being a consideration. While race was a factor, it was not the main or predominant factor, he stated. Dr. Reed also testified that first and foremost he wanted a plan that would pass the legislature. He also stated he wanted a plan that was racially fair. He knew what the traditional districting principles for drafting a reapportionment plan were and testified that race did not predominate over his consideration of those traditional factors and principles.

Dr. Reed testified that any plan that was to pass in the Legislature had to be acceptable to the Speaker of the House of Representatives and a majority of its members. He set out to negotiate on behalf of black citizens for a fair plan. In drawing the plan, Dr. Reed worked with persons inside and outside the Alabama Legislature. One of the goals of Dr. Reed was to create more black majority seats in the Legislature, but the plan must also satisfy the one-person-one vote requirement. The plan created eight (8) new majority black house districts and three (3) new majority black senate districts. One of the new majority black districts created in the plan was House District 83, which follows substantially the traditional lines of a Lee County Commission district.

In Lee County, as with the entire plan, Dr. Reed's motive was to draw districts favoring incumbents who would pledge their support for the plan. The key person with whom Dr. Reed negotiated in drawing the plan was Speaker Jimmy Clark. Speaker Clark testified that he worked with Joe Reed to get a plan passed that preserved his district and had the most support in the Legislature. According to Speaker Clark, several plans were submitted and defeated, and many of the plans tried to reduce his influence so others could challenge his position as Speaker of the House. He testified in working with Dr. Reed he wanted a district that preserved the rural representation of Barbour County and that he did not want his county split into five (5) districts, as it had been under a prior federal court plan. Clark also testified that his goal was also to help protect women lawmakers who supported his leadership.

The evidence further shows that the configuration of Lee County is also due to the addition of a portion of the county to incumbent Representative Bill Fuller's House District 38. Results of the 1990 census required Rep. Fuller to expand his district into Lee County because it had lost population. Rep. Fuller testified that he agreed to support the plan when Dr. Reed agreed to give him the northern and eastern part of Lee County, the East Lake area, and a small portion of Opelika. These were areas where Rep. Fuller was known through his law practice and where he had friends and relatives.

The evidence also shows that Representative Jane Gullatt, who represented House District 80 and resided in Phoenix City, was unhappy with her district as originally drawn by Dr. Reed. She came to Dr. Reed with other women serving in the Legislature and asked for changes she thought would help her candidacy and avoid reducing the already small number of female legislators. These changes involved extending her district into southern Lee County, primarily in the rural areas, while maintaining Russell County as the predominant part of her district. These changes were drawn in and Rep. Gullatt agreed to support the plan.

District 82, represented by the late Thomas Reed, had consisted entirely of Bullock and Macon Counties in the 1983 plan, but it was underpopulated according to 1990 census data. It had to be extended into western Lee County to avoid splitting Tallapoosa or some other nearby county.

Representatives Turnham and Higginbotham, who represented the districts containing Auburn and Opelika

respectively, did not attempt to negotiate with Dr. Reed, Speaker Clark, or those who had input into drafting the plan. Turnham and Higginbotham, who did not support the plan, got what was left after all the plan's supporters who needed part of Lee County had been satisfied. The plan was also put out for comment and input before it was finalized. Changes were made to 70 different House Districts and 30 different Senate Districts. As a result of these non-racial influences, Lee County was carved into five (5) House districts and three (3) Senate districts.

The court finds that although the race of the voters was a consideration in the construction of these districts, it was not allowed to subordinate other traditional, race-neutral districting principles, namely, reducing population deviations greater than plus or minus 5%, preserving the integrity of nearby smaller counties and avoiding splitting them into two or more districts, satisfying the incumbency protection and other concerns of Speaker Clark and Representatives Fuller, Gullatt and Thomas Reed, and approximating the boundaries of pre-existing county commission lines, which correspond to racially identifiable communities of interest in Lee County.

With respect to the analysis of compactness, it has become substantially mathematical, as a result of the work of Pildes and Niemi and the United States Supreme Court's reference to it in *Bush v. Vera*. The Sinkfield Plaintiffs presented the expert testimony of Gerald Webster to the effect that House Districts 79 and 83 were compact. The Rice intervenors' only effort to rebut Webster's conclusions was a document from a Dr. Hofeller. Hofeller's report is not sufficient to rebut Webster's testimony. Hofeller's report is conclusory and has limited

mathematical analysis. Moreover, it was rendered prior to the Supreme Court decision in *Miller v. Johnson* and *Bush v. Vera*, so it does not take their guidance into account.

(1) Strict Scrutiny is not triggered

The Consent Decree Plan creates several new majority black districts, including a new majority black district in Lee County. The court finds that the districts as drawn form genuine communities of interest. Districts drawn to connect black citizens who form genuine communities of interest are not invidious and are not subject to strict judicial scrutiny. *Dillard v. City of Greensboro*, 946 F.Supp. 946, 953-55 (M.D. Ala. 1996) (citing authorities). "A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. '[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.' " *Miller v. Johnson*, 115 S.Ct. at 2490, *quoting Shaw*, 113 S.Ct. at 2826.

The court further finds that black citizens, including those in Lee County, have exercised their right of free political association under the First, Thirteenth and Fifteenth Amendments, to form and to support political organizations who support their political interests so that they have an equal opportunity to elect candidates of their choice. A majority of black voters are represented by the Alabama Democratic Conference, the Alabama New South Coalition and the Jefferson County Citizens' Coalition. The fact that black voters have chosen to allow

representatives of the organizations to represent their political interests does not make a plan negotiated by these groups inherently suspect, and thus, subject to strict scrutiny. Every citizen of this state and country has the right under the First and Fourteenth Amendments of free political association and to negotiate for the fullest representation allowable in a political system. To hold black political negotiators to a different standard, and impose strict scrutiny simply because they are black, would be a retreat to the dark days of this country's history which should forever remain history.

Here again, the U.S. Supreme Court provides sufficient guidance on when strict scrutiny applies:

> Strict scrutiny would not be appropriate if race-neutral, traditional districting considerations predominated over racial ones. We have not subjected political gerrymandering to strict scrutiny. See *Davis v. Bandemer*, 478 U.S. 109, 132, 106 S.Ct. 2797, 2810, 92 L.Ed.2d 85 (1986) (White, J., plurality opinion) ("[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole"); *id.*, at 147, 106 S.Ct., at 2818 (O'Connor, J., concurring in judgment) ("[P]urely political gerrymandering claims" are not justiciable). And we have recognized incumbency protection, at least in the limited form of "avoiding contests between incumbent[s]," as a legitimate state goal. *See Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct. 2653, 2663, 77 L.Ed.2d 133 (1983); *White v. Weiser*, 412 U.S. 783, 797, 93 S.Ct. 2348,

> 2355-2356, 37 L.Ed.2d 335 (1973); *Burns v. Richardson*, 384 U.S. 73, 89, n. 16, 86 S.Ct. 1286, 1294, n. 16, 16 L.Ed.2d 376 (1966); *cf. Gaffney v. Cummings*, 412 U.S. 735, 751-754, and 752, n. 18, 93 S.Ct. 2321, 2330-2332, and 2331, n. 18, 37 L.Ed.2d 298 (1973) (State may draw irregular district lines in order to allocate seats proportionately to major political parties). Because it is clear that race was not the only factor that motivated the legislature to draw irregular district lines, we must scrutinize each challenged district to determine whether the District Court's conclusion that race predominated over legitimate districting considerations, including incumbency, can be sustained. *Bush v. Vera*, 116 S.Ct. at 1954.

So long as the districts do not violate *Shaw* and the rights of the Rices and of white voters, and they are otherwise constitutional, there is no need for strict scrutiny. In this case, the challenged districts do not violate *Shaw* and the evidence presented by State Defendant Bennett and the Sinkfield Plaintiffs shows that the rights of the plaintiff intervenors and white voters in Lee County are not violated. Thus, strict scrutiny is not triggered.

The plaintiff-intervenors cannot prevail on the merits of their *Shaw* claim in that they have failed to prove that race was a "predominant factor" motivating the configuration of the challenged districts and that race-neutral districting principles, such as compactness, contiguity, respect for political subdivisions or communities defined by actual shared interest were subordinated to the consideration of race. The evidence shows, and the court so finds, that the configuration of the challenged districts

were the result of political negotiation among many persons, including the principal drafter Dr. Joe Reed, Secretary of State Billy Joe Camp, Attorney General James Evans and Speaker of the House Jimmy Clark, Representatives Bill Fuller, Jane Gullatt, Perry Hooper and others. The court is satisfied with the evidence for the explanations for the configurations of House Districts 79 and 83 and Senate Districts 27 and 28 and finds that race was not the "predominant factor" in their drafting. Race-neutral districting principles, such as compactness, contiguity, respect for political subdivisions or communities defined by actual shared interest were not subordinated to the consideration of race.

C. Rice Intervenor's Voter Dilution Claim

Finally, Plaintiff-intervenor John Rice contends that six (6) majority black Senate districts and nineteen (19) majority black House districts were designed intentionally to overpopulate majority white districts and thereby to dilute the voting strength of white voters. To establish white vote dilution caused by a single-member district plan, the Rice intervenors must meet the evidentiary standards of *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986):

> First, they must show that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district." Second, they must prove that the minority group "is politically cohesive." Third, the plaintiffs must establish "that the [black] majority votes sufficiently as a bloc to enable

> it . . . usually to defeat the [white] minority's preferred candidate.

Voinovich v. Quilter, 507 U.S. 146, 157-58 (1993) *citing Growe v. Emison*, 507 U.S. 25, 40 (1993). Moreover, to prevail, the plaintiffs have the burden of showing that the "minor" deviation in the plan results solely from the promotion of an unconstitutional or irrational state policy. Thus, the plaintiff must demonstrate that the asserted unconstitutional or irrational state policy is the actual reason for the deviation. In addition, the plaintiff must prove that the minor population deviation is not caused by the promotion of legitimate state policies. *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F.Supp. 1022, 1032 (D. Md. *1994*).

The evidence shows that all eight (8) of the majority black Senate districts are underpopulated and six (6) are underpopulated by more than 4%. Of the twenty-seven (27) House districts, all but two (2) are underpopulated. Both Dr. Reed and Speaker Clark testified that they were not aware how many districts were over or under populated. Dr. Reed testified that the guideline and policy he used was that which was provided by the State Reapportionment Office of the Legislature of having all districts to fall within a plus or minus 5% deviation. State Defendant Bennett, while submitting that Plaintiff Rice is not entitled to relief, argues that the voter dilution claim is "troublesome." Defendant Bennett suggests that the Legislature or the people of Alabama should consider imposing a tighter variance on the drafter of future plans by legislation or by constitutional amendment. Defendant Bennett's argument here misses the mark. The evidence establishes that all the districts are within the plus or

minus 5% deviation which is within the framework of state policy and has been held to be constitutional. The one district which exceeds the deviation has been justified. The court finds that there is no evidence that there was an intentional design to underpopulate majority black districts or overpopulate majority white districts so as to dilute the voting strength of white voters. Also, there is no evidence of any injury to Plaintiff Rice or that his voting strength has been diluted. Plaintiff Rice cannot prevail on the merits of this claim. The districts complained of are all within constitutionally permissible limits.

Based on the foregoing findings and conclusions, it is ORDERED, ADJUDGED and DECREED that the Consent Decree Plan, specifically House Districts 79 and 83 and Senate Districts 27 and 28 are constitutional as drawn and do not violate the constitutional rights of the Plaintiff-intervenors or white citizens. The claims contained in their complaint is hereby DENIED. The 1998 election cycle will proceed as scheduled under the Consent Decree Plan previously approved by the court.

Plaintiffs Darryl Sinkfield, et al., are prevailing parties and are entitled to the recovery of attorney fees and expenses from the defendants. Plaintiffs have thirty (30) days within which to submit a petition to determine the amount of fees and expenses to which they are entitled.

The Court retains jurisdiction of this action and this Decree and for such further and additional relief as may be equitable and just, until such time as the defendants submits evidence that a new redistricting plan for the Alabama Legislature meeting all the requirements of the

Constitution and laws of Alabama and the United States has been adopted pursuant to Alabama law and has received preclearance under Section 5 of the Voting Right Act, 42 U.S.C. Section 1773c.

The clerk is hereby directed to provide a copy of this order to the three-judge court in *Rice v. Smith,* CA No. 97-A-715-E (M.D. Ala.).

DONE this the 20 day of November 1997.

/s/ Charles Price
Charles Price, Circuit Judge

cc: Terry G. Davis
Solomon S. Seay
James U. Blacksher
Edward Still
Charles E. Grainger, Jr.
William Pryor
Mark G. Montiel
John Park
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In The

Supreme Court of the United States

JAMES BENNETT, in his official capacity as Secretary of State of Alabama, et al.,

Appellants,

v.

PEGGY KELLEY, et al.,

Appellees,

and

DARRYL SINKFIELD, et al.,

Appellants,

v.

PEGGY KELLEY, et al.,

Appellees.

On Appeals From The United States District Court For The Middle District Of Alabama

APPENDIX TO JURISDICTIONAL STATEMENTS
Volume II, Pages 180a to 374a

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John **RICE** and Camilla L. **Rice**, etc., Plaintiffs,

v.

Hal **SMITH**, etc., et al., Defendants.

Civil Action No. 97-A-715-E.

United States District Court,
M.D. Alabama,
Eastern Division.

Dec. 19, 1997.

Kathleen A. Brown, Mark G. Montiel, Montgomery, AL, for John Rice and Camilla Rice.

John J. Park, Jr., Stanley E. Graham, Office of Attorney General, Montgomery, AL, Charles E. Grainger, Jr., Assistant Attorney General, Alabama Secretary of State's Office, Montgomery, Al, for Hal Smith and James Bennett.

James U. Blacksher, Birmingham, AL, Terry G. Davis, Terry G. Davis, P.C., Montgomery, AL, Solomon S. Seay, Jr., Montgomery, AL, Edward Still, Lawyers' Committee for Civil Rights Under Law, Director, Voting Rights Project, Washington, DC, for Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon, Andrew Hayden and State of Alabama.

Before JOEL F. DUBINA, Circuit Judge, MYRON H. THOMPSON, Chief Judge, and W. HAROLD ALBRITTON, District Judge.

MEMORANDUM OPINION

MYRON H. THOMPSON, Chief Judge.

This three-judge court, which has been empaneled pursuant to 28 U.S.C.A. § 2284, is confronted with a

recently recurring issue: how a federal court confronted with a challenge to the apportionment of a State governing body should proceed when State courts have addressed, or appear poised to address, the challenge. This is also an important issue because it directly implicates federal-state relations.

In this lawsuit, plaintiffs John Rice and Camilla L. Rice (Rice plaintiffs) and plaintiffs Andrew Thompson, et al. (Thompson plaintiffs) challenge the apportionment plan of Alabama's State Legislature.[1] They claim that the plan impermissibly impinges in several ways on the equal protection clause of the fourteenth amendment: it violates the one person-one vote principle, it dilutes the voting strength of non-black voters, and it is a product of racial gerrymandering. The defendants are the Secretary of State of Alabama and the Probate Judge of Lee County, Alabama (State defendants), and the named representatives of a plaintiff class of African-American voters in a parallel State court proceeding (Sinkfield defendants). Jurisdiction is proper under 28 U.S.C.A. §§ 1331, 1343.

At oral argument on November 26, 1997, the Rice plaintiffs contended that we should stay this proceeding as to their claims because, although the State trial court has addressed the claims, the Alabama Supreme Court

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[1] Some of the defendants dispute whether the Thompson plaintiffs were properly added to this litigation. The Thompson plaintiffs were added to the Rice plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 15, rather than by intervening pursuant to Federal Rule of Civil Procedure 24. By referring to the Thompson plaintiffs as "plaintiffs," we should not be understood to have resolved this dispute in this memorandum opinion today.

has yet to hear their appeal. The Thompson plaintiffs contended that we should proceed ahead as to their claims because the claims were not part of the State court proceeding.

I.

Twice now, this federal court has been confronted with a challenge to Alabama's legislative plan for the State House and Senate. In 1992 and 1993, two groups of plaintiffs – a group of African-American plaintiffs and a group of Republicans – brought two lawsuits challenging legislative apportionment.[2] The federal court stayed and eventually dismissed the cases in favor of a State court consent decree.[3]

Four years later, in 1997, the Rice plaintiffs brought the current federal lawsuit, essentially challenging the apportionment plan adopted in the 1993 State court consent decree. We stayed our hand again, finding that it appeared that the State court which had entered the 1993

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[2] These two federal lawsuits are *Brooks v. Camp*, civil action no. 92-T-364-N (M.D.Ala.), and *Peters v. Folsom*, civil action no. 93-T- 124-N (M.D.Ala.).

[3] This court initially stayed the proceedings on the ground that the legislative process had not run its course. In the meantime, a state lawsuit was brought in which the court entered a consent decree adopting a reapportionment plan for the entire State legislature. *Sinkfield v. Bennett*, civil action no. 93-689-PR (Aug. 13, 1993). A question then arose as to whether the State court had authority to adopt the plan. We certified the question to the Alabama Supreme Court, which answered in the affirmative. *Brooks v. Hobbie*, 631 So.2d 883 (Ala.1993). We then dismissed the federal court proceedings.

consent decree was still available to consider the Rice plaintiffs' challenge. The Rice plaintiffs then presented their claims to the State court, which, after setting an aggressive trial schedule, found the claims to be without merit. The Rice plaintiffs have now appealed the State court judgment to the Alabama Supreme Court.[4]

In the meantime, and before the State court conducted its trial, the Rice plaintiffs amended their federal court complaint to add the Thompson plaintiffs as parties.[5]

As stated, the important issue for us is how to proceed on the Rice plaintiffs' and the Thompson plaintiffs' claims in light of the recent events in State court.

II.

A.

In *Growe v. Emison*, the United States Supreme Court held that federal judges are "required . . . to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself." 507 U.S. 25, 33, 113 S.Ct. 1075, 1080, 122 L.Ed.2d 388 (1993) (emphasis in original). Federal judges are to "prefer[ ] both state branches to federal courts as agents of apportionment." *Id.* at 34, 113 S.Ct. at 1081 (emphasis in original). The Court based this holding on a doctrine – the abstention

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[4] State defendants' submission of documents filed in parallel State court proceedings, filed in this court December 11, 1997.

[5] Order, filed September 23, 1997.

doctrine – whose origins arise out of principles of federalism and reach back over half a century.[6] The Court explained that it has "required deferral, causing a federal court to 'sta[y] its hands,' when a constitutional issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case." *Id.* at 32, 113 S.Ct. at 1080 (quoting *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941)). It has allowed abstention "when the federal action raises difficult questions of state law bearing on important matters of state policy, or when federal jurisdiction has been invoked to restrain ongoing state criminal proceedings." *Id.* (citing *Colorado River Water*

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[6] Indeed, some commentators have rejected the singular use of an abstention doctrine: "[I]t is more precise to refer to 'abstention doctrines,' since there are several distinguishable lines of cases, involving different factual situations, different procedural consequences, different policy considerations, and different arguments for and against their validity." 17A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4241, at 25. We use the term "abstention" broadly to refer not only to the decision to "abstain" from hearing a plaintiff's claims, requiring dismissal, but also to the decision to "defer" to parallel state proceedings while staying the federal court litigation. Although the United States Supreme Court differentiated in *Growe*, 507 U.S. at 32 n. 1, 113 S.Ct. at 1080 n. 1, between abstention and deferral, the lower courts and other authorities have continued to use the term "abstention" to describe both actions. *See, e.g., Benavidez v. Eu*, 34 F.3d 825, 832-33 (9th Cir.1994) (distinguishing between "deferral abstention" and "dismissal abstention"); 17A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure (2d ed. Supp.1997) § 4241, at 1 ("to change the terminology now would be confusing rather than clarifying.").

Conservation Dist. v. United States, 424 U.S. 800, 814-817, 96 S.Ct. 1236, 1244-1246, 47 L.Ed.2d 483 (1976)).

However, abstention within the reapportionment context differs in an important respect from that in other contexts, for it marks a unique burden shift within the doctrine. In other contexts, a federal court's decision to decline to exercise jurisdiction is disfavored and thus exceptional. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, ___, 116 S.Ct. 1712, 1721, 135 L.Ed.2d 1 (1996) ("We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."); *Colorado River*, 424 U.S. at 813, 96 S.Ct. at 1244 ("The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.") (quoting *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188-189, 79 S.Ct. 1060, 1062-63, 3 L.Ed.2d 1163 (1959)). But in the reapportionment context, when parallel State proceedings exist, the decision to refrain from hearing the litigant's claims should be the routine course.

The rationale behind this distinction lies in the inherently greater interest a State has in legislative reapportionment. As the Court explained in *Growe*, "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." 507 U.S. at 34, 113 S.Ct. at 1081.

"Absent evidence," the Court continued, "that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id. See also Brooks v. Hobbie*, 631 So.2d 883, 889-90 (Ala.1993) ("Redistricting is both a sensitive and political issue. There is no dispute that the legislature has the initial responsibility to act in redistricting matters . . . However, in the event the legislature fails to act, the responsibility shifts to the state judiciary.") (citations omitted). The Court also focused on the more universal practical factor in favor of abstention, "the nature of the relief requested," *Growe*, 507 U.S. at 35, 113 S.Ct. at 1081, and observed that a State "can have only one set of legislative districts." *Id.*

B.

Relying on these principles, this court has twice deferred or stayed federal proceedings in favor of State court proceedings in which there was a challenge to Alabama's legislative apportionment. In 1993, when the federal court stayed and eventually dismissed the two original cases challenging State apportionment, it relied on *Growe*. And more recently, in the fall of 1997, when we stayed proceedings on the Rice plaintiffs' claims, we again expressly relied on *Growe*.

The Rice plaintiffs admit that we cannot consider their claims in the face of the State court decision on their claims. Relying on *Growe*, however, they ask that we stay, rather than dismiss, their claims. We cannot agree. Because the State court has adjudicated the merits of their

claims, both res judicata and the Rooker-Feldman doctrine preclude this court's review of that decision.[7] The Rice plaintiffs argue that because the Alabama Supreme Court could potentially fail to grant timely review of their appeal, this court should retain jurisdiction so as to provide them with a forum in which to obtain substantive review of the State court decision. Not only does this argument contravene the above-stated Rooker-Feldman doctrine – under which only the United States Supreme Court can entertain a proceeding to reverse or modify a State court judgment on the merits[8] – but the United States Supreme Court expressly rejected such an argument in *Growe*, when it wrote: "We fail to see the relevance of the speed of appellate review. [Precedent] requires only that the state agencies adopt a constitutional plan 'within ample time . . . to be utilized in the [upcoming] election . . . It does not require appellate review of the plan prior to the election.' " 507 U.S. at 35, 113 S.Ct. at 1081 (citations omitted). The Rice plaintiffs further note that the Alabama Supreme Court could reverse the State court decision and find that the State court was without jurisdiction from the start. This argument, however, is a compelling reason as to why the dismissal of the Rice plaintiffs' claims should be without prejudice, which we will do.

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[7] District courts are courts of original jurisdiction; only the Supreme Court can entertain a proceeding to reverse or modify a State court judgment on the merits. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

[8] *Id.*

With regard to the Thompson plaintiffs' claims, we believe we should again take our instructions from *Growe* and stay our hand. First, by ruling on the merits of the Rice plaintiffs' constitutional claims in a timely fashion, the State court has indicated not only its willingness to entertain challenges to Alabama's redistricting plan, but also its ability to resolve such claims in an exigent manner. The United States Supreme Court has made clear that, "Absent evidence that the[ ] state branches will timely fail to perform [the redistricting] duty," a federal court should not interject itself into the State's matter. *Growe*, 507 U.S. at 34, 113 S.Ct. at 1081. While it is true that the Thompson plaintiffs have not had their claims resolved by the State court, we are convinced that the State court is willing or able to hear such claims. Indeed, the State court offered the Thompson plaintiffs an opportunity to intervene in the Rice plaintiffs' proceedings, but the Thompson plaintiffs declined to do so. We know of no reason why the State court would not still entertain the Thompson plaintiffs' claims.[9]

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[9] In the order entered on August 14, 1997, we not only "stayed" our hand, we "directed" the Rice plaintiffs to intervene in the State court proceedings. The Rice plaintiffs have taken issue with whether the State court proceeding was in a posture that warranted our stay and whether we had the authority to issue a directive to a party as to what to do in another proceeding. Whether our earlier decision was premature or authorized is an issue we need no longer reach because the Rice plaintiffs did intervene and the State court has now ruled on their claims. Moreover, since our order of August 14, 1997, the calculus has changed to make *Growe* deferral clearly appropriate. As stated, the State court has not only reaffirmed jurisdiction over the State legislative plan, it has entertained

Second, the State defendants stated at oral argument, without refutation from the Thompson plaintiffs, that a decision by us in favor of the Thompson plaintiffs would probably impact the remainder of the plan, including the part addressed by the State court recently. Alabama "can have only one set of legislative districts." *Growe*, 507 U.S. at 35, 113 S.Ct. at 1081.

Third and finally, having participated in the creation of the reapportionment plan and having recently heard evidence as to the constitutionality of the plan, the State court is far better equipped to handle the Thompson plaintiffs' claims, as well as those of any future litigant interested in the outcome of the proceedings. This factor reinforces the conclusion that we should defer to the State court.[10]

An appropriate judgment will be entered.

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and resolved claims almost identical to those now asserted by the Thompson plaintiffs.

[10] In *Growe*, the United States Supreme Court stated that federal courts are required "to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself." 507 U.S. at 33, 113 S.Ct. at 1080 (emphasis in original and added). At oral argument, the Sinkfield defendants suggested that, under a logical extension of *Growe*, a federal court is required to abstain in favor of State courts even if there is no pending or ongoing State court proceeding. Before being eligible for relief in federal court, according to the Sinkfield defendants, a federal plaintiff must be able to show that he or she first sought relief in State court and the State court failed to entertain his or her claim at all or in a timely manner. We do not reach this issue.

ORDER

In accordance with the memorandum opinion entered on this date, it is the ORDER, JUDGMENT, and DECREE of the court:

1. The claims of plaintiffs John and Camilla L. Rice are dismissed without prejudice;

2. This case is stayed as to the claims of plaintiffs Andrew Thompson, et al.

It is further ORDERED that the following motions are denied as moot: the Rice plaintiffs' motion for class certification, filed May 2, 1997; the Rice plaintiffs' motion for a preliminary injunction, filed May 2, 1997; the Rice plaintiff's motion for reconsideration of this court's order of August 14, 1997, filed August 28, 1997; the Rice plaintiffs' motion to dismiss the Sinkfield defendants, filed October 24, 1997; the Rice plaintiffs' motion to amend and supplement the complaint, filed October 24, 1997; the Rice plaintiffs' motion to compel discovery requests and for sanctions, filed November 11, 1997; the Rice plaintiffs' request to schedule an evidentiary hearing, filed November 25, 1997; the Sinkfield defendants' motions to dismiss and/or motions for judgment on the pleadings, filed July 10, 1997, October 9, 1997, October 27, 1997, November 25, 1997. It is further ORDERED that the Sinkfield defendants' motion for leave to withdraw their second motion to dismiss, filed September 23, 1997, is granted.

It is further ORDERED that the disposition of the following motions are stayed pursuant to the general stay issued today: the State defendants' motion for an order to show cause why the Sinkfield defendants should not be dismissed, filed November 10, 1997; the State defendants'

motion for summary judgment, filed November 25, 1997; the Permanent Legislative Committee's motion to intervene as defendants, filed November 7, 1997.

ALBRITTON, District Judge, concurring.

I write in concurrence to clarify my view of the limited nature of our action in this case, and to avoid future citation of our opinion as precedent for propositions which are not intended.

The Sinkfield defendants have asked the court throughout the course of this litigation to hold that a party who wishes to challenge the constitutionality of a state's legislative apportionment or congressional districting must first take the case to a state court as a prerequisite to a federal action. In their proposed scheme, only when the state court fails to act expeditiously may the claim then be brought to federal court. While footnote 10 of the majority opinion correctly states that we do not reach this issue, I believe that the footnote, without more explanation, might lend more credence to the Sinkfield's proposition than is due. I would only defer to an existing state court proceeding. I would not abstain because the Plaintiff had not first filed suit in state court.

In *Growe* the Supreme Court said:

> In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the state, through its legislative or judicial branch, has begun to address that highly political task itself.

Growe, 507 U.S. at 33, 113 S.Ct. at 1080 (emphasis in original).

Deferring to the state's legislature is quite different from requiring a party to first seek relief in a state court when there is no ongoing case. There is only one legislature, and it has the primary responsibility for apportionment and districting.[1] Only in the absence of legislative action does the judicial branch come in, and then the question arises as to which state court will act.[2]

Growe requires deferral only when the state "has begun to address" the issue. Deferral to the legislative

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[1] Of course, giving the legislature primary responsibility for districting is not required by any federal law or Constitutional provision. A state may choose another method. Indeed many states have chosen such a method in an attempt to depoliticize (as much as possible) the duty of districting. *See* Jeffrey C. Kubin, The Case for Redistricting Commissions, 75 Tex. L.Rev. 837 (1997) (discussing 17 states which have adopted redistricting commissions, and the various forms that those commissions may take). Apparently the idea of a redistricting commission is being considered in Alabama's neighboring state of Florida. *See* George L. Waas, The Process and Politics of Legislative Reapportionment and Redistricting under the Florida Constitution, 18 Nova L.Rev. 1001, 1034-35 (1994).

[2] At least one state apparently uses a specialized three-judge court, similar to this three-judge court, when a court must redistrict or reapportion. *See Growe*, 507 U.S. at 28, 113 S.Ct. at 1077 (referencing fact that "Minnesota Supreme Court appointed a Special Redistricting Panel (composed of one appellate judge and two district judges) to preside over the case."). A specialized court may avoid duplicative litigation at the state level, and could also avoid the resentment that sometimes arises when a judge elected by a single circuit's voters takes action which affects the entire state.

branch can be justified even if no proposed legislation is pending at the time, because of the legislature's continuing duty in this area, and because of the legislature's freedom to act on any issue at any time. This is not so with the judicial branch, which generally cannot act unless someone first files the appropriate suit in some court. This makes *Growe's* requirement of deferral to a branch of state government which "has begun" to address the issue highly significant when applied to the judicial branch. There is simply no way that the state judicial branch can be said to "ha[ve] begun" to act unless there is a pending case in a state court which has jurisdiction over the issue.

This court's action in this case, therefore, should not be taken to suggest in any way that a person who wishes to raise a constitutional challenge to congressional and legislative districts must first file a new lawsuit in some state court. We have deferred to a state court which "has begun to address" the issue of the constitutionality of state legislative districts under the 1990 census. That is the issue which was before the state court, and that court has held that it retained jurisdiction of the case to enforce its judgment.[3]

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[3] Florida state courts apparently dealt with the problem of multiple suits throughout the state by having the state supreme court retain jurisdiction. *See* In re Apportionment Law Appearing as Senate Joint Resolution 1 E, 1982 Special Apportionment Session; Constitutionality Vel Non, 414 So.2d 1040, 1052 (1982) ("we retain exclusive state jurisdiction to consider any and all future proceeding [sic] relating to the validity of this apportionment plan").

The Plaintiffs argue that deferral is not appropriate in this case because it is the state court's redistricting plan itself that they challenge as being unconstitutional. There was no appeal from the state court in 1993 because there was a consent decree. The Plaintiffs say that the parties in state court consented to an unconstitutional plan and that they, as non-parties to the consent decree, should be able to challenge the plan now in federal court.

I agree with the Plaintiffs that *Growe* does not prohibit this court from considering their challenge, and we have not held that it does. We have found it to be prudent, and in furtherance of the concept of federalism, however, to defer under the particular circumstances of this case. Those circumstances are that the state court adopted the challenged plan before the Supreme Court enunciated new legal principles to be applied in reapportionment cases, specifically in what has been referred to as "race-based" districting. *See Abrams v. Johnson*, ___ U.S. ___, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997); *Bush v. Vera*, 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996); *Shaw v. Hunt*, 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); *Miller v. Johnson*, 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *United States v. Hays*, 515 U.S. 737, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995); and *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). This court determined that because of that, it would be preferable for the state court to have an opportunity to review its plan in light of the new Supreme Court decisions, with appellate review available in the Alabama Supreme Court, and possibly the Supreme Court of the United States.

The Rice Plaintiffs intervened in the state court, at our direction. They now say that we were without authority to direct that intervention. Be that as it may, no motion for reconsideration was filed here before the intervention, and the state court has acted. Since we are dismissing the claims of the Rice plaintiffs, they are free to seek appellate review of our decision to defer.

The Thompson Plaintiffs are free to intervene in the state court case to seek determination there of the constitutionality of the plan as it relates to their districts, with appellate review available if necessary. If the state court is unable or unwilling to entertain their claims, or if the Alabama Supreme Court should hold in the Rice appeal that the Circuit Court of Montgomery County did not have jurisdiction over the Rice claims, then I would be prepared to let the case proceed in this court, subject, of course, to consideration of pending motions and defenses, including the defense of laches.

I wish to emphasize that it is only because (1) a state court has held that it has retained jurisdiction over the state legislative reapportionment plan based on the 1990 census, and (2) very substantial changes were made by the Supreme Court of the United States in the law governing legislative reapportionment after that plan was adopted, that I agree to defer to the state trial court, with the possibility of appellate review of its decision. In the absence of either of those facts, I would have favored hearing the constitutional attack on the consent decree entered by the state court. I do not believe that this

court's decision should be viewed as going beyond that, and, therefore,

I concur.

John RICE and Camilla L. Rice

v.

Darryl SINKFIELD, et al.

1970449.

Supreme Court of Alabama.

Dec. 18, 1998.

Rehearing Dismissed April 1, 1999.

Mark G. Montiel and Kathleen A. Brown of Mark G. Montiel, P.C., Montgomery, for appellants.

James U. Blacksher, Birmingham; Terry G. Davis, Montgomery; Solomon S. Seay, Jr., Montgomery; and Edward Still, Lawyers' Committee for Civil Rights, Washington, D.C., for appellee Darryl Sinkfield et al.

Bill Pryor, atty. gen., and John J. Park, Jr., and Charles E. Grainger, Jr., asst. attys. gen., for appellee Secretary of State James Bennett.

PER CURIAM.

The plaintiffs, John Rice and Camilla L. Rice, appeal from the Montgomery Circuit Court's order upholding a 1993 consent judgment that adopted the "Reed-Buskey" redistricting plan. The plan, which was approved as part of the redistricting process due to follow the 1990 census, created eight new majority-black House districts and three new majority-black Senate districts. The Alabama House of Representatives approved the plan, but the Senate did not. The plan was precleared by the Justice Department and it is now in effect.

Four years after the adoption of the Reed-Buskey plan, the Rices challenged the 1993 consent judgment on

constitutional grounds. They specifically argued that the legislative districts in which they live were created through racial gerrymandering and that the votes of white voters in those districts had been diluted.

The plaintiffs' request for modification of the 1993 consent judgment – which is based on the 1990 federal census – is moot because it would not affect future legislative elections. *See City of Birmingham v. Southern Bell Tel. & Tel. Co.*, 234 Ala. 526, 529, 176 So. 301, 303 (1937) (" '[I]t is not within the province of appellate courts to decide abstract, hypothetical, or moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow.' ") (quoting 4 C.J.S., *Appeal and Error*, § 40, pp. 117-18). The next legislative election is scheduled for the year 2002. *See* Ala.Code 1975, § 17-2-3 (providing that state legislators will be elected every four years beginning in 1978). By that time, the report of the 2000 federal census is scheduled to be released, and we must assume that the Legislature will timely fulfill its constitutional duty to redraw legislative districts based on that census. *See* 13 U.S.C. § 141(c) (1988) (providing that the Bureau of the Census should forward its decennial census results to the states not later than April 1, 2001); Ala. Const.1901, §§ 198 – 200 (providing that the state Legislature will redraw election districts in the next session after the taking of each decennial census); *Opinion of the Justices No. 269*, 384 So.2d 1051, 1052 (Ala.1980) (stating that this Court must assume that the Legislature acts in a manner consistent with the Constitution) (citing *Board of Revenue & Road Comm'rs v. Puckett*, 227 Ala. 374, 149 So. 850 (1933)). Thus, we must conclude that the elections held in 2002 and subsequent

years will be governed not by the current consent judgment, but by a new districting plan that is based on the 2000 federal census. Because we must assume that any potential modification of the current consent judgment based on the 1990 census would not affect the outcome of the 2002 legislative election or any successive legislative election, we must conclude that an effort by this Court to render the relief sought by the plaintiffs would not be effective.[1]

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[1] The Supreme Court of the United States has recognized several exceptions to the federal doctrine of mootness that are applicable to cases involving: (1) class actions where some members of the class still have a live case or controversy; (2) wrongs capable of repetition, yet evading review; (3) continuing collateral consequences to a party; and (4) voluntary cessation of injurious activity by a party who is free to resume it. *See Sosna v. Iowa*, 419 U.S. 393, 399, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) (holding that mootness of the class representative's particular claim did not render the entire class action moot as long as other members of the class continued to have a live controversy); *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969) (holding that plaintiffs' challenge to state election law was not moot, even after the challenged election was completed, because the plaintiffs could challenge the law with respect to future elections, so that the basis of their claim might be "capable of repetition, yet evading review"); *Sibron v. New York*, 392 U.S. 40, 53-58, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) (holding that a challenge to the seizure of evidence, brought by defendants who had already completed their jail sentences, was not moot, because the defendants could still suffer adverse "collateral consequences" arising from their criminal records); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953) (holding that the Government's antitrust challenge to the defendant corporations' practice of using interlocking boards of directors was not rendered moot by the defendants' voluntarily ceasing the practice, because the

Therefore, this appeal is dismissed as moot.

APPEAL DISMISSED AS MOOT.

HOOPER, C.J., and MADDOX, HOUSTON, KENNEDY, COOK, SEE, and LYONS, JJ., concur.

ALMON, J., concurs in the result.

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defendants were free to resume that practice at any time). The rationales underlying these exceptions are not applicable to this case.

Andrew D. THOMPSON, et al., Plaintiffs,
v.
Hal SMITH, etc., et al., Defendants.

No. Civ.A. 97-A-715-E.

United States District Court,
M.D. Alabama,
Eastern Division.

July 2, 1999.

David R. Boyd, Balch & Bingham, Montgomery, AL, for movant represented by Boyd.

Stanley E. Graham, Waller, Lansden, Dortch & Davis, Nashville, TN, for defendant represented by Graham.

Jeffrey G. Hunter, Montiel & Brown, P.C., Montgomery, AL, for plaintiff represented by Hunter.

Jordan Dorman Walker, Jr., Balch & Bingham, Montgomery, AL, for movant represented by Walker.

Before JOEL F. DUBINA, Circuit Judge, W. HAROLD ALBRITTON, Chief District Judge, and MYRON H. THOMPSON, District Judge.

MEMORANDUM OPINION

MYRON H. THOMPSON, District Judge.

The question before this three-judge federal court, empaneled pursuant to 28 U.S.C.A. § 2284, is whether claims brought by a group of voters who are challenging a state legislative districting plan are barred by an earlier final judgment in a state lawsuit in which two other voters challenged the same plan. For the reasons that

follow, we hold, on motions for summary judgment, that this federal lawsuit is barred in part only.

I. SUMMARY-JUDGMENT STANDARD

The summary-judgment standard applicable here almost needs no repeating. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Once the party seeking summary judgment has informed the court of the basis for its motion, the burden shifts to the nonmoving party to demonstrate why summary judgment would be inappropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *see also Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-17 (11th Cir.1993) (discussing how the responsibilities on the movant and the nonmovant vary depending on whether the legal issues, as to which the facts in question pertain, are ones on which the movant or nonmovant bears the burden of proof at trial). In making its determination, the court must view all evidence and any factual inferences in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

II. BACKGROUND

This federal litigation has a long and complex history involving two lawsuits in different fora. The first is a state lawsuit in the Circuit Court of Montgomery County,

Alabama, that resulted in a consent judgment approving a redistricting plan for the Alabama House of Representatives and Senate.[1] The second is this federal lawsuit in which certain Alabama voters now seek to challenge the state-court redistricting plan on grounds of vote dilution, violation of the one-person-one-vote principle, and race-based gerrymandering.

There are four groups involved in these cases. First, there are the Rice plaintiffs, two white persons who initiated the federal lawsuit.[2] Second, there are the Thompson plaintiffs, a group of white persons whom the Rice plaintiffs later added to their complaint.[3] Third, there are the state defendants one of whom was also a defendant in the state lawsuit.[4] And, lastly, there are the Sinkfield parties, a group of African-Americans who were successful plaintiffs in the state lawsuit and were later named as defendants in this federal suit.[5]

The sequence of events leading up to the current dispute is as follows.

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[1] *See Sinkfield. v. Camp*, CV-93-689-PR, slip op. (Ala.Cir.Ct. Aug. 13, 1993).

[2] The Rice plaintiffs are: John Rice and Camilla L. Rice.

[3] The Thompson plaintiffs are: Andrew D. Thompson, Peggy C. Kelly, Gonzalo F. Montiel, Ann G. Hunter, Daniel P. Brown, W. Ricardo Montiel, Karen D. Outlaw, Kelly Brasher, and Bibb Gunter.

[4] The state defendants are: Hal Smith, probate judge of Lee County, James Bennett, Secretary of State of Alabama, and the State of Alabama. The defendant in the state lawsuit was James Bennett, in his official capacity as Secretary of State of Alabama.

[5] The Sinkfield parties are: Darryl Sinkfield, Quinton Ross, Bernest Brooks, Rubin McKinnon, and Andrew Hayden.

August 13, 1993: The state court entered a consent judgment between the Sinkfield parties and the Secretary of State of Alabama approving a redistricting plan for the Alabama legislature.

May 2, 1997: The Rice plaintiffs filed this federal lawsuit challenging the state-court plan on the following three grounds: vote-dilution, violation of the one-person-one-vote principle, and race-based gerrymandering.

August 14, 1997: This court, relying on *Growe v. Emison*, 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), directed the Rice plaintiffs to intervene in the state lawsuit. They did so on August 28, 1997.

August 29 and September 9, 1997: After intervening in the state lawsuit, the Rice plaintiffs moved to amend their federal complaint to add the Thompson plaintiffs as parties. The Thompson plaintiffs (with the exception of Andrew D. Thompson) reside in different legislative districts from the Rice plaintiffs. In the amendments, the Thompson plaintiffs essentially adopted the Rice plaintiffs' claims of vote-dilution, violation of the one-person-one-vote principle, and race-based gerrymandering.

October 15, 1997: This court granted the Rice plaintiffs' motions to amend, and the Thompson plaintiffs were added as parties.

October 17, 1997: The state court invited the Thompson plaintiffs to intervene in the state-court action, but they refused.

November 20, 1997: After hearing the merits, the state court dismissed the Rice plaintiffs' claims. The state

court found that their one-person-one-vote and vote-dilution claims lacked merit and that there was no evidence that race was a predominant factor in the redistricting process sufficient to support their race-based gerrymandering claim.

December 19, 1997: The Rice plaintiffs turned again to this federal court, and, in light of the state-court judgment, we dismissed their complaint without prejudice on the basis of res judicata and the Rooker-Feldman doctrine.[6] *See Rice v. Smith*, 988 F.Supp. 1437, 1440 (M.D.Ala.1997) (three-judge court). Relying on *Growe v. Emison*, we also stayed the Thompson plaintiffs' claims in order to provide them with another opportunity to file their claims in state court. *See id.* at 1441.

December 18, 1998: The Rice plaintiffs appealed the state-court decision, and, on this date, the Alabama Supreme Court dismissed their appeal as "moot." *Rice v. Sinkfield*, 732 So.2d 993 (Ala.1998) (per curiam). The court reasoned that, because the "next legislative election is scheduled for the year 2002," and because "[b]y that time, the report of the 2000 federal census is scheduled to be released, . . . the elections held in 2002 and subsequent years will be governed not by the current consent judgment, but by a new districting plan that is based on the 2000 federal census." *Id.*

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[6] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S.Ct. 1303, 1314-15, 75 L.Ed.2d 206 (1983).

January 27, 1999: This federal court required that the parties show cause as to why this federal lawsuit should not be dismissed in light of the decision of the Alabama Supreme Court.

February 5, 1999: The Thompson plaintiffs responded by asking that this court proceed with their claims.

April 30, 1999: This federal court treated as motions for summary judgment certain motions to dismiss and for judgment on the pleadings, filed earlier by the state defendants and the Sinkfield parties, and the court set the motions for briefing. These summary-judgment motions are now before us.

III. DISCUSSION

The motions for summary judgment present two issues: first, whether the Thompson plaintiffs should be barred from further pursuit of their claims in this federal court because they failed to take advantage of the opportunity we gave them to pursue those claims in state court; and, second, whether the Thompson plaintiffs' claims are barred by the state-court judgment based on the principle of res judicata.

A. Deferral

In the order entered December 19, 1997, relying on *Growe v. Emison*, we deferred to the on-going state lawsuit, stayed our hand until the state court system had fully addressed the claims being pursued by the Rice plaintiffs, and suggested that, in the meantime, the

Thompson plaintiffs should seek intervention in that lawsuit to present their claims. *See Rice*, 988 F.Supp. at 1440. The Thompson plaintiffs have now returned to this court, contending that, because the Alabama Supreme Court has held that it is too late to afford redress for the upcoming legislative elections, the Alabama courts are now closed to them and they should now be allowed to proceed in this court. The state defendants and the Sinkfield parties respond that the Thompson plaintiffs should be barred from further pursuit in this case because they failed to intervene in the state lawsuit. We agree with the Thompson plaintiffs.

Admittedly, we earlier deferred to the state court because the state-court proceeding was still on-going and "the State court [was] willing or able to hear such claims." *Id.* at 1440. However, this circumstance no longer obtains. As the Thompson plaintiffs correctly point out, the Alabama Supreme Court has held that their claims are moot, and, as a result, the Alabama courts are now essentially closed to them. With these changed circumstances, there is no longer a state proceeding to which to defer.[7]

We also cannot accept the contention of the state defendants and the Sinkfield parties that the Thompson

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[7] A closer reading of *Growe v. Emison* could lead to the conclusion that a federal court is required to defer to the state court's remedial efforts only, not to the state-court proceeding altogether. In this instance, of course, we deferred to the entire state-court proceeding. We need not resolve whether deferral should have been limited to the state court's remedial efforts only.

plaintiffs, by not intervening in the state lawsuit, essentially defaulted on their claims in this court. The United States Supreme Court in *Growe* made clear that federal courts and state courts have concurrent jurisdiction to entertain challenges to redistricting plans and that, as a result, both courts are open to such claims. *See* 507 U.S. at 32, 113 S.Ct. at 1080. *Growe* stands only for the proposition that the federal court must 'defer' to any state-court redistricting effort; it does not say that the federal court must dismiss its own proceedings. *See id.* at 32 n. 1, 113 S.Ct. at 1080 n. 1. Indeed, in *Growe*, the Supreme Court acknowledged that, after the state court had completed its proceeding, the federal court later rightfully took up the remaining claim under § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C.A. § 1973, *see* 507 U.S. at 38-39, 113 S.Ct. at 1083; *Growe* did not require that the plaintiffs there pursue their § 2 claim in state court as well.

Similarly, here, now that the Alabama courts have completed their involvement in the legislative redistricting, this court can take up the Thompson plaintiffs' claims – subject, of course, to any res judicata and other defenses that may follow from the state judgment. *See id.* at 35-36, 113 S.Ct. at 1082 (federal court, under principles of federalism and comity embodied in Full Faith and Credit Act, 28 U.S.C.A. § 1738, required to give "legal effect" to state redistricting judgment).

B. Res Judicata

We therefore now turn to the question whether the judgment obtained by the Rice plaintiffs in state court

bars the Thompson plaintiffs' claims in this court. A federal court must give preclusive effect to state-court decisions "whenever the court of the State from which the judgment emerged would do so." *Allen v. McCurry*, 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980); *see also Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 525, 106 S.Ct. 768, 772, 88 L.Ed.2d 877 (1986). The court must therefore look to Alabama law to determine whether an Alabama state court would give preclusive effect to the state-court decision.

"Under Alabama law, the essential elements of res judicata are: '(1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits.' If all of these elements are met, any claim that was or could have been adjudicated in the previous action is precluded. If even one element of the four is not met, however, res judicata is not applicable." *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1560 (11th Cir.1990) (citations omitted).[8]

Although the Alabama Supreme Court dismissed the appeal from the state-court judgment as moot, the first requirement, a prior judgment on the merits, is still met

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[8] Res judicata is usually raised as an affirmative defense in the answer to a complaint. *See* Fed.R.Civ.P. 8(c). However, "[a]lthough Rule 8(c) includes res judicata and collateral estoppel on the list of affirmative defenses that must be pleaded specifically by answer, these defenses may be raised for the first time on a motion for summary judgment." *Kachler v. Taylor*, 849 F.Supp. 1503, 1515 (M.D.Ala.1994) (Thompson, J.). Here, the opportunity of raising either defense was unavailable until the state court had rendered its decision.

because the appellate court did not vacate the state-court judgment and thus that judgment is still valid. *See, e.g., Gross v. QMS, Inc.*, 669 So.2d 839, 840 (Ala.1995); *Masonry Arts, Inc. v. Mobile County Comm'n*, 628 So.2d 334, 335 (Ala.1993); *Arrington v. State ex rel. Parsons*, 422 So.2d 759, 760 (Ala.1982). It is also undisputed that the second requirement, a court of competent jurisdiction, is met. Therefore, the two remaining questions are whether there is a substantial identity of parties and whether the same causes of action were presented.

1. Identity of Parties

Alabama law defines 'identity of the parties' broadly – as broadly as due process allows. *See Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm'n*, 401 So.2d 764, 770 (Ala.1981). The key inquiry is whether the interests of the party against whom res judicata is asserted were adequately represented by a party to the prior lawsuit. *See id.* When the party against whom res judicata is asserted was not itself a party to the prior lawsuit, however, the court must undertake a further inquiry to determine whether the application of res judicata would offend the due process guarantees of the fourteenth amendment to the United States Constitution. *See Richards v. Jefferson County*, 517 U.S. 793, 797 n. 4, 116 S.Ct. 1761, 1765 n. 4, 135 L.Ed.2d 76 (1996).

There is little doubt that in state court the Rice plaintiffs adequately represented the interests now asserted by the Thompson plaintiffs here. The Thompson plaintiffs did not enter this lawsuit as intervenors seeking to assert a separate interest in the subject matter of this law suit,

see Fed.R.Civ.P. 24 (intervention), but instead were joined as parties by amendment of the Rice plaintiffs' complaint, *see* Fed.R.Civ.P. 15 (amendment), Fed.R.Civ.P. 20 (permissive joinder of parties). Together with the Rice plaintiffs, they sought to be designated as representatives of all non-black Alabama voters. The Rice plaintiffs sought the same designation in state court, and all of the Thompson plaintiffs are members of this putative class. The Thompson plaintiffs thus cannot be characterized as strangers to the state-court action and are more properly characterized as alter-egos of the Rice plaintiffs with identical or closely-aligned interests. Accordingly, we conclude that the Thompson plaintiffs were adequately represented in state court by the Rice plaintiffs. *See Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.) (subsequent suit by a non-party may be precluded "if one of the parties to the suit is so closely aligned with [the non-party's] interests as to be his virtual representative"), cert. denied, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975).

The court's inquiry cannot end here, however, because the United States Supreme Court in *Richards* made clear that there is a due-process component to res judicata as well. In that case, the Supreme Court held that, as a matter of federal due process, prior taxpayer litigation challenging an occupation t[illegible] in Jefferson County, Alabama, could not bind a different group of Alabama taxpayers challenging the same tax even though the courts below had found adequate representation under Alabama law. The Court observed that the party against whom res judicata had been asserted had received no notice of the prior suit and had been given no

opportunity to be heard. *See Richards*, 517 U.S. at 799, 116 S.Ct. at 1766 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). The Court further observed that the plaintiffs in the prior litigation did not purport to sue on behalf of a class, and the Court found no reason to suppose that the earlier court took care to protect the interests of the unrepresented parties. In other words, *Richards* suggests that some of the concerns that should inform a court in its due-process analysis include whether the plaintiffs in the prior litigation purported to sue on behalf of a class that includes the plaintiff against whom res judicata is asserted, whether there was "full and fair consideration of the common issue," *id.* at 801, 116 S.Ct. at 1767, whether the non-party had been informed that the original lawsuit is pending, *id.* at 799, 116 S.Ct. at 1766; and whether the non-party could "choose for himself whether to appear or default, acquiesce or contest." *Id.*

This case, therefore, presents a situation entirely different from that in *Richards*. The state court invited the Thompson plaintiffs to participate in the prior suit, and this court twice suggested that they do the same.[9] The Thompson plaintiffs thus had notice of the state litigation and were given ample opportunity to be heard. The Rice plaintiffs, moreover, expressly sought to represent a class that clearly includes the Thompson plaintiffs, and there is

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[9] This court also ordered the Rice plaintiffs to file with the court all pleadings and other documents they filed in the state-court action, together with all orders issued by the state court. *See* order entered September 23, 1997. The Thompson plaintiffs were thus kept fully abreast of the state-court proceeding.

every reason to conclude that the state court took care to protect the interests of non-party class members. The Thompson plaintiffs were fully aware of these class claims and yet did nothing. Under these circumstances, the court cannot conclude that it would offend due process to bind the Thompson plaintiffs to the prior litigation, and we turn next to the issue of whether the same causes of actions were present.

2. Same Causes of Action

To determine whether two lawsuits present the same causes of action, Alabama courts apply a test "that in certain respects is similar to, but which is not the same as, the 'same transaction' test" in the Restatement (Second) of Judgments. *Equity Resources Management, Inc. v. Vinson*, 723 So.2d 634, 637 (Ala.1998). Because there is no mathematically precise definition for when there is an identity of causes of action, the test for making such determination has many formulations, but the principal inquiries are essentially two: (1) whether the claims 'arise out of' the same evidence, wrongful acts or disputes, *see id.* at 637, 638, or present the same issues (in particular, factual ones), *see, e.g., Selma Foundry & Supply Co. v. Peoples Bank & Trust Co.*, 598 So.2d 844, 848 (Ala.1992); and (2) whether the claims would be subject to proof by the same evidence, *Vinson*, 723 So.2d at 637. Also probative, but not determinative, is "the identity [of] or differences in the forms of the two actions." *Id.* at 638.

a. Vote-Dilution and One-Person-One-Vote Claims

Upon their addition as parties to the case, the Thompson plaintiffs simply adopted the Rice plaintiffs' one-person-one-vote and vote-dilution claims by reference to the Rice plaintiffs' complaint. Because the Rice plaintiffs repeated these claims verbatim in their state-court complaint, the Thompson plaintiffs' one-person-one-vote and vote-dilution claims before this court are identical in form to the Rice plaintiffs' one-person-one-vote and vote-dilution claims presented in state court.

The one-person-one-vote claims in both state and federal court allege that the state's current redistricting plan violates the equal-protection principles articulated in *Reynolds v. Sims*, 377 U.S. 533, 577, 84 S.Ct. 1362, 1390, 12 L.Ed.2d 506 (1964), in that the plan as a whole fails to establish population equality within constitutionally acceptable percentage variations. The claims in both cases arise out of the formation of the state's current redistricting plan, present identical issues of fact, and are subject to proof by the same plan-wide evidence of population disparities and other factors considered by the state court; in other words, the plaintiffs in both state and federal court would arguably prove their claim by showing that a district anywhere in the State exceeded the permissible relative variations in population size. The claims are therefore identical in substance and present the same causes of action for purposes of res judicata.

The vote-dilution claims in state and federal court allege that the defendants intentionally underpopulated

the majority-black districts and overpopulated the majority-white districts in the current redistricting plan for the purpose of diluting white voting strength in violation of the equal protection clause of the fourteenth amendment. Like the one-person-one-vote claims, the vote-dilution claims in both cases arise out of the formation of the state's current redistricting plan. The vote-dilution claims, however, would require proof of racial motivation. The vote-dilution claims would nevertheless be subject to the same proof in federal court as they were in state court and are identical in substance for purposes of res judicata; in other words, the plaintiffs in both state and federal court would arguably prove their claim by showing that a district any where in the State had been intentionally created with an underpopulated black majority so as to dilute white voting strength.

b. Race-Based Gerrymandering Claim

Each of the Thompson plaintiffs alleges that the House and Senate district in which he or she lives was racially gerrymandered in violation of the equal protection clause of the fourteenth amendment. Only Andrew Thompson, however, challenges a district named in the Rice plaintiffs' state-court complaint, and, in response to a motion by the state defendants, the state court expressly limited the Rice plaintiffs' gerrymandering claim to the districts in which the Rice plaintiffs reside: House Districts 79 and 83 and Senate Districts 27 and 28. The other Thompson plaintiffs live in districts outside of

those addressed by the state court, and their gerrymandering claims could not have been asserted by the Rice plaintiffs for lack of standing.[10]

Andrew Thompson claims that the State has adopted a plan which, on the basis of race, gerrymanders Senate District 28 and House District 82. Thompson thus raises the same issue as to his Senate district – whether Senate District 28 was racially gerrymandered – raised by the Rice plaintiffs in state court. The other Thompson plaintiffs, by contrast, raise issues specific to the districts in which they live and which were not raised in the state-court proceeding, as does Thompson in regard to House District 82.

Furthermore, the evidence that would be required to establish a race-based gerrymandering claim is necessarily district-specific. A plaintiff must show either (1) that the district in which he or she lives "has no rational explanation except as an effort to separate voters on the basis of race," or (2) that, in redrawing the district, "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness,

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[10] Voters entitled to pursue a gerrymandering claim are limited to those who reside within the racially gerrymandered district or those who can show by "specific evidence" that they suffer the "special harms" associated with "personally be[ing] subjected to a racial classification" under the redistricting plan. *United States v. Hays*, 515 U.S. 737, 744- 45, 115 S.Ct. 2431, 2436, 132 L.Ed.2d 635 (1995); *see also Bush v. Vera*, 517 U.S. 952, 957-58, 116 S.Ct. 1941, 1951, 135 L.Ed.2d 248 (1996) (plurality opinion). The district-specific nature of a gerrymandering claim is in contrast to the plan-wide nature of a vote-dilution or one-person-one-vote claim.

contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 903, 916, 115 S.Ct. 2475, 2482, 2488, 132 L.Ed.2d 762 (1995); *see also Bush v. Vera*, 517 U.S. 952, 959, 116 S.Ct. 1941, 1952, 135 L.Ed.2d 248 (1996); *Shaw v. Reno*, 509 U.S. 630, 644, 113 S.Ct. 2816, 2825, 125 L.Ed.2d 511 (1993). Different evidence would therefore be required to establish the Thompson plaintiffs' gerrymandering claims, save that of Andrew Thompson's Senate claim, than was required in state court to prove the Rice plaintiffs' claims.

Although the state court did examine how the plan as a whole was drafted, it focused primarily on the manner in which the drafters drew House Districts 79 and 83 and Senate Districts 27 and 28. Indeed, there is little that Andrew Thompson could add to the evidence presented by the Rice plaintiffs on Senate District 28. As to House District 82 and for the other Thompson plaintiffs, though, the evidence presented in state court would largely not address their claim.

The court must therefore conclude that only Andrew Thompson's race-based gerrymandering claim for Senate District 28 presents the same cause of action presented by the Rice plaintiffs in state court.

In conclusion, we hold that the motions for summary judgment filed by the state defendants and the Sinkfield parties should be granted as to the vote-dilution and one-person-one-vote claims of all the Thompson plaintiffs and as to Andrew Thompson's race-based gerrymandering challenge to Senate District 28, and otherwise denied. An appropriate order will be entered.

ORDER

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court that the motions for summary judgment filed by the state defendants on March 17, 1999 (Doc. no.129), and the Sinkfield parties on March 17, 1999 (Doc. no. 131), are granted to the extent that the following claims are dismissed: (1) the vote-dilution and one-person-one-vote claims of all the Thompson plaintiffs; and (2) plaintiff Andrew D. Thompson's race-based gerrymandering challenge to Senate District 28. This case will proceed as to all remaining claims and unaddressed defenses.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

ANDREW D. THOMPSON, et al.,	)	
Plaintiffs,	)	CIVIL ACTION NO. 97-A-715-E
v.	)	
HAL SMITH, etc., et al.,	)	
Defendants.	)	

Before EMMETT R. COX, Circuit Judge, W. HAROLD ALBRITTON, Chief District Judge, and MYRON H. THOMPSON, District Judge.

THOMPSON, District Judge.

OPINION

(Filed Dec. 30, 1999)

This three-judge court will now take up the motions for summary judgment with respect to plaintiff Peggy C. Kelley's challenges to Alabama House District 88 (HD 88), filed by the state defendants[1] and by the Sinkfield defendants.[2] Kelley is one of a group of eight plaintiffs, all white Alabama voters, who filed this lawsuit to challenge their state legislative voting districts on the grounds that the districts were racially gerrymandered in violation of the equal protection clause of the fourteenth

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[1] Filed October 13, 1999 (Doc. no. 205).

[2] Filed October 25, 1999 (Doc. no. 219).

amendment. The plaintiffs named two groups of defendants: the state defendants, Alabama Secretary of State James Bennett and Lee County Probate Judge Hal Smith, both sued in their official capacities; and the Sinkfield defendants, a group of black voters who achieved the current legislative districting plan as part of a consent decree in a previous lawsuit which they filed in state court.

Both groups of defendants moved for summary judgment in their favor as to Kelley's claims regarding HD 88. We heard oral argument on the summary judgment motions on December 17, 1999, and entered an order granting summary judgment on HD 88 on December 20, 1999.[3] We now give the reasons for that order.

I.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Where, as in this case, the non-moving party bears the burden of proof on an issue at trial, "the moving party, in order to prevail, must do one of two things: show that the non-moving party has no evidence to support its case, or present 'affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial.' " *Hammer v. Slater*, 20 F.3d 1137, 1141 (11th Cir. 1994) (quoting *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir. 1991) (en

[3] Entered December 20, 1999 (Doc. no. 288).

banc)). Once the party seeking summary judgment has informed the court of the basis for its motion, the burden shifts to the non-moving party to demonstrate why summary judgment would be inappropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). In making its determination, the court must view all evidence and any factual inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

II.

This case has a long and complex history, which we set forth at length in our opinion of July 2, 1999, reported at 52 F. Supp.2d 1364 (M.D. Ala. 1999), and which we will therefore not recount here. Rather, we shall focus our attention on the particular claims raised by Kelley with regard to HD 88.

Kelley is a resident of HD 88, whose population is 79.59% white and 19.71% black. HD 88 comprises all of Autauga County and a small part of Elmore County, including all of the town of Prattville and part of Millbrook. The part of Millbrook not included in HD 88 lies within House District 75 (HD 75).

Kelley's claim that HD 88 was racially gerrymandered focuses to a large extent on the division of the town of Millbrook between HD 88 and HD 75. She argues that Millbrook and Prattville together constitute a community of interest, and therefore, under traditional districting principles, should have been placed in the same district.

The division of Millbrook, Kelley adds, does not contribute to the compactness or contiguity of HD 88. Since the Millbrook/Prattville community was thus "needlessly" divided, Kelley concludes that the only possible reason for drawing HD 88 in this way is race.

Both the state defendants and the Sinkfield defendants have moved for summary judgment on Kelley's claims against HD 88, arguing that Kelley has not provided evidence to support essential elements of her claims.

III.

The United States Supreme Court first recognized a cause of action under the equal protection clause of the fourteenth amendment for claims of racial gerrymandering in *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816 (1993). Courts analyze these types of claims in two steps. First, a court determines whether to apply the strict scrutiny afforded to classifications based on race, by examining whether the challenged districting plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts based on race." *Id.* at 649, 113 S.Ct. at 2828. The Supreme Court further explained the requirements for satisfaction of this element in *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 2488 (1995), stating that strict scrutiny should be applied only where race is the "predominant factor" in the drawing of district lines. Plaintiffs may prove that race was predominant through evidence that "the legislature subordinated traditional

race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* Once the court has determined that strict scrutiny is appropriate, it proceeds to the second step of *Shaw* analysis: consideration of whether the district lines were narrowly tailored to further a compelling state interest. *Shaw*, 509 U.S. at 658, 113 S.Ct. at 2832.

The defendants in this case focus their arguments on the first element of Kelley's *Shaw* claim. They contend that she has provided no evidence indicating that race was a factor in drawing the boundaries of HD 88, and that the district lines are therefore not subject to any equal protection analysis, much less strict scrutiny. To support this contention, the defendants point to evidence of the racial composition of HD 88 and its neighboring districts. Since Kelley argues that the division of Millbrook between HD 88 and HD 75 demonstrates that race was the underlying motive of the legislature, the defendants have offered evidence to show that this division had no impact on the racial composition of either district. Both HD 88 and HD 75 are predominantly white: HD 88 is 79.59% white, and HD 75 is 78.26% white.[4] Demographic evidence also indicates that Millbrook was not divided along racial lines. The part of Millbrook that lies within HD 88 is 75.80% white, and the part that lies

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[4] *See* State Defendants' Memo, filed Oct. 13, 1999, at 9 (Doc. no. 206).

within HD 75 is 83.23% white.[5] Where the evidence clearly demonstrates that the drawing of district lines did not have the effect of classifying individuals by race, or by any other impermissible category for that matter, the equal protection clause is not implicated.

Despite the overwhelming evidence that the division of Millbrook had no racial effect, Kelley attempts to demonstrate that race was a motivating factor through the testimony of Dr. Joe Reed, one of the central negotiators of the current districting plan. Dr. Reed has openly stated that his role in this process was to represent the interests of black voters, and that his primary goal was to increase black representation in the Alabama legislature. However, Kelley has produced no specific evidence that Dr. Reed had race-based motivations for drawing the line between HD 88 and HD 75. General evidence about Dr. Reed's goals in drawing the state-wide districting plan as a whole is not sufficient to show that HD88 in particular was drawn for racial reasons.

Finally, Kelley implies that the division of the town of Millbrook is unlawful because defendants have not proven that it was necessary. Kelley states in her brief that Millbrook was "needlessly divided" and that "[t]here was no one person-one vote necessity to divide Millbrook, Alabama."[6] However, whether the drawing of district lines was necessary to achieve one goal or another

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[5] *See* Response of Plaintiff Kelley, filed Nov. 4, 1999, at 7-8 (Doc. no. 235).

[6] *Id.* at 6-8.

has no bearing on Kelley's equal protection claim. Legislators may consider a wide variety of factors in drawing district lines, and they are at liberty to prioritize among these in whatever fashion they choose, so long as they do not rely primarily on an impermissible factor such as race. In cases such as this one, where the evidence demonstrates clearly that race played no role in the drawing of district lines, the State is by no means obliged to demonstrate that the choices it made were necessary to preserve communities of interest or to achieve any other constitutionally permissible goal.

IV.

For the above reasons, we concluded in our order of December 20, 1999, that summary judgment should be entered in favor of the defendants on Kelley's claims regarding HD 88.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

ANDREW D. THOMPSON, et al.,	)	
Paintiffs,	)	CIVIL ACTION NO. 97-A-715-E
v.	)	
HAL SMITH, etc., et al.,	)	
Defendants.	)	

Before EMMETT R. COX, Circuit Judge, W. HAROLD ALBRITTON, Chief District Judge, and MYRON H. THOMPSON, District Judge.

THOMPSON, District Judge.

OPINION

(Filed Jan. 3, 2000)

This three-judge court will now take up the motions for summary judgment with respect to plaintiff Andrew D. Thompson's challenges to Alabama House District 82 (HD 82), filed by the state defendants[1] and by the Sinkfield defendants.[2] Thompson is one of a group of eight plaintiffs, all white Alabama voters, who filed this lawsuit to challenge their state legislative voting districts on the grounds that the districts were racially gerrymandered in violation of the equal protection clause of the fourteenth amendment. The plaintiffs named two groups

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[1] Filed October 6, 1999 (Doc. no. 198).

[2] Filed October 25, 1999 (Doc. no. 214)

of defendants: the state defendants, Alabama Secretary of State James Bennett and Lee County Probate Judge Hal Smith, both sued in their official capacities; and the Sinkfield defendants, a group of black voters who achieved the current legislative districting plan as part of a consent decree in a previous lawsuit, which they filed in state court.

Both groups of defendants moved for summary judgment in their favor as to Thompson's claims regarding HD 82. We heard oral argument on the summary judgment motions on December 17, 1999, and entered an order granting summary judgment on HD 82 on December 20, 1999.[3] We now give the reasons for that order.

I.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Where, as in this case, the non-moving party bears the burden of proof on an issue at trial, "the moving party, in order to prevail, must do one of two things: show that the non-moving party has no evidence to support its case, or present 'affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial.' " *Hammer v. Slater*, 20 F.3d 1137, 1141 (11th Cir. 1994) (quoting *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir. 1991) (en banc)). Once the party seeking summary judgment has

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[3] Entered December 20, 1999 (Doc. no. 289).

informed the court of the basis for its motion, the burden shifts to the non-moving party to demonstrate why summary judgment would be inappropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). In making its determination, the court must view all evidence and any factual inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

II.

This case has a long and complex history, which we set forth at length in our opinion of July 2, 1999, reported at 52 F. Supp.2d 1364 (M.D. Ala. 1999), and which we will therefore not recount here. Rather, we shall focus our attention on the particular claims raised by Thompson with regard to HD 82.

Andrew Thompson resides in Shorter, Alabama, a town in Macon County and in HD 82, which comprises all of Macon and Bullock Counties, as well as a small part of Lee County. According to 1990 census figures, HD 82 is 79.73% black and 19.81% white. The total population of HD 82 is 38,257, including 24,928 Macon County residents, 11,042 Bullock County residents, and 2,287 persons residing in Lee County.

Because the Macon and Bullock County portions of HD 82 simply follow county borders, Thompson's claim of racial gerrymandering focuses on the inclusion of a portion of Lee County in HD 82. His claim rests in large part on what he contends is the bizarre shape of this piece of Lee County, which one of plaintiff's experts calls

"a robot-arm extension," and describes as "appear[ing] to jump over Auburn to reach the northwest portion of Opelika."[4] Because, according to Thompson, this area unnecessarily defeats both the compactness of HD 82 and the preservation of communities of interest in Lee County, he maintains that racial considerations are the only possible reason for drawing what he considers such a bizarrely shaped district.

Both the state defendants and the Sinkfield defendants have moved for summary judgment on Thompson's claims against HD 82, arguing that Thompson has not provided evidence to support an essential element of his claim, and producing additional evidence to suggest that Thompson could not succeed in proving that HD 82 was impermissibly racially gerrymandered.

III.

The United States Supreme Court first recognized a cause of action under the equal protection clause of the fourteenth amendment for claims of racial gerrymandering in *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993). Courts analyze these types of claims in two steps. First, a court determines whether to apply the strict scrutiny afforded to classifications based on race, by examining whether the challenged districting plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts based on race." *Id.* at 649, 113 S. Ct. at

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[4] Plaintiffs' Response in Opposition to State Defendants' Motion, filed Oct. 28, 1999, at 9 (Doc. no. 225).

2828. The Supreme Court further explained the requirements for satisfaction of this element in *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 2488 (1995), stating that strict scrutiny should be applied only where race is the "predominant factor" in the drawing of district lines. Plaintiffs may prove that race was predominant through evidence that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* Once the court has determined that strict scrutiny is appropriate, it proceeds to the second step of *Shaw* analysis: consideration of whether the district lines were narrowly tailored to further a compelling state interest. *Shaw*, 509 U.S. at 658, 113 S. Ct. at 2832.

The defendants in this case focus their arguments on the first element of Thompson's *Shaw* claim. They contend that Thompson's evidence does not support the conclusion that race was a factor in drawing the boundaries of HD 82, and they have produced additional evidence demonstrating that race could not have been a predominant factor in the drawing of HD 82. The defendants therefore argue that HD 82's boundaries are not subject to any equal protection analysis, much less strict scrutiny. We agree.

First, the shape of HD 82, which forms the cornerstone of Thompson's claim, is not bizarre enough to support on its own a conclusion of racial gerrymandering. The Supreme Court did state in *Shaw v. Reno* that "[i]n some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be

understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." 509 U.S. at 646-47, 113 S. Ct. at 2826. However, HD 82 is not such an exceptional case, especially as compared with the district challenged in. *Shaw v. Reno,* which passed through ten counties and "winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas," 509 U.S. at 635, 113 S. Ct. at 2821, or with the Texas districts challenged in *Bush v. Vera,* one of which was described as having "many narrow corridors, wings, or fingers." 517 U.S. 952, 973, 116 S. Ct. 1941, 1959 (1996). Though. the somewhat irregular shape of HD 82 can be considered by the court as evidence of the alleged racial gerrymandering, on its own it is not sufficient to create a genuine issue of fact and to defeat the motions for summary judgment.

In addition to the evidence of HD 82's shape, Thompson relies on evidence provided by two expert witnesses. Neither expert's testimony supports Thompson's claim that HD 82 was racially gerrymandered, however. The first expert, Dr. Ron W. Weber, makes several conclusory statements indicating that "race was a predominant factor" in the drawing of a long list of legislative districts in Alabama, but he does not provide any specific evidence suggesting that racial considerations predominated in the creation of HD 82 in particular.[5]

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[5] Plaintiffs' Response in Opposition to State Defendants' Motion, filed Oct. 28, 1999, at 7 (Doc. no. 225).

Thompson's second expert, Dr. William Stewart, is equally unhelpful to his claim. The main thrust of Stewart's report appears to be that HD 82 must have been racially gerrymandered in violation of the constitution, because no evidence suggests that its particular shape was otherwise necessary.[6] However, whether the drawing of district lines was necessary to achieve one goal or another has no bearing on Thompson's equal protection claim. Redistrictors may consider a wide variety of factors in drawing district lines, and they are at liberty to prioritize among these in whatever fashion they choose, so long as they do not rely primarily on an impermissible factor such as race. In order to defeat a claim of racial gerrymandering, the State is by no means obliged to demonstrate that the choices made were necessary to preserve communities of interest or to achieve compactness or any other constitutionally permissible goal.

Finally, Thompson attempts to demonstrate that race was a motivating factor in the drawing of HD 82 through the testimony of Dr. Joe Reed one of the central negotiators of the current districting plan. Dr. Reed has openly stated that his role in this process was to represent the interests of black voters, and that his primary goal was to increase black representation in the Alabama legislature. However, Thompson has produced no specific evidence that Dr. Reed had race-based motivations in drawing the boundaries of HD 82. General evidence about Dr. Reed's goals in drawing the state-wide districting plan as a

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[6] *Id.* at 8-9 ("Towns, cities, and other definable communities of interest generally have been split unnecessarily and without any compelling justification for doing so.")

whole is not sufficient to show that HD82 in particular was drawn for racial reasons.

In addition to demonstrating that Thompson's evidence is insufficient to make out a cognizable claim of unconstitutional racial gerrymandering, the defendants have presented evidence demonstrating that race was not the predominant factor in drawing HD 82. First, defendants have shown that the inclusion of part of Lee county in HD 82 was necessary to achieve as close as possible to the ideal population in the district as a whole. The 1990 census indicated that the ideal population for an Alabama house district was 38,482; because only 35,970 people reside in Macon and Bullock Counties combined, the adopted plan added 2,287 people from Lee County to raise the total population of HD 82 to 38, 257.[7]

The defendants have also produced demographic evidence indicating that the race of those Lee county residents who were added to HD 82 did not significantly impact the racial composition of the district as a whole. Mason and Bullock Counties standing alone, without the part of Lee County that was added, are 81.53% black. With the addition of 2,287 Lee County residents, HD 82 is now 79.73% black; in other words, the addition of part of Lee County to HD 82 changed the black majority in the district by only 1.8%. Even more defeating to Thompson's claim is the fact that the effect of adding part of Lee County to HD 82 was to dilute rather than to strengthen the black population of HD 82. Though Thompson has

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[7] Memorandum in Support of Motion for Summary Judgment in Favor of State Defendants, filed Oct. 6, 1999, at 10 (Doc. No. 199).

never asserted the specific basis for his Shaw claim, we assume, since he resides in a majority-black district. that he believes HD 82 was gerrymandered to be predominantly black. If his primary argument supporting this claim is that an ill-formed finger was carved out of Lee county and appended to his otherwise compact district, then his claim falls flat when the evidence shows that the finger actually made his district less rather than more predominantly black.

Indeed, demographic evidence also demonstrates that, even if every one of the Lee County residents that was added on to HD 82 were white, the black majority in the district as a whole would only have been reduced by 3%[8] Any way that the State made up for Macon and Bullock Counties' population deficit, HD 82 would still have been predominantly black. Thompson's claim that the addition of part of Lee county to HD 82 is evidence of racial gerrymandering therefore has no merit.

IV.

For the above reasons, we concluded in our order of December 20, 1999, that summary judgment should be entered in favor of the defendants on Thompson's claims regarding HD 82.

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[8] Sinkfield Defendants' Consolidated Brief, filed Oct. 25, 1999, at 6 (Doc. no. 223).

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

ANDREW D. THOMPSON, et al.,	)	
Plaintiffs,	)	CIVIL ACTION NO. 97-A-715-E
v.	)	
HAL SMITH, etc., et al.,	)	
Defendants.	)	

Before EMMETT R. COX, Circuit Judge, W. HAROLD ALBRITTON, Chief District Judge, and MYRON H. THOMPSON, District Judge. ALBRITTON, Chief District Judge.

MEMORANDUM OPINION

(Filed Jan. 6, 2000)

I. INTRODUCTION

This three judge court will now take up the motions for summary judgment with respect to Plaintiff Daniel Brown's challenges to Alabama House District 73 (HD73), filed by the state defendants[1] and by the Sinkfield defendants.[2] Brown is one of a group of eight plaintiffs, all white Alabama voters, who filed this lawsuit to challenge their state legislative voting districts on the ground that the districts were racially gerrymandered in violation of

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[1] Filed October 25, 1999 (Doc. # 211).

[2] Filed October 25, 1999 (Doc. # 217).

the equal protection clause of the fourteenth amendment. The plaintiffs named two groups of defendants: the state defendants, Alabama Secretary of State James Bennett and Lee County Probate Judge Hal Smith, both sued in their official capacities; and the Sinkfield defendants, a group of black voters who achieved the current legislative districting plan as part of a consent decree in a previous lawsuit, which they filed in state court.

Both groups of defendants moved for summary judgment in their favor as to Brown's claims regarding HD 73. We heard oral argument on the summary judgment motions on December 17, 1999. For the reasons discussed below, the motions are due to be GRANTED.

II. SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Where, as in this case, the non-moving party bears the burden of proof on an issue at trial, "the moving party, in order to prevail, must do one of two things: show that the non-moving party has no evidence to support its case, or present 'affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial.'" *Hammer v. Slater*, 20 F.3d 1137, 1141 (11th Cir. 1994) (quoting *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir. 1991) (en banc)). Once the party seeking summary judgment has informed the court of the basis for its motion, the burden

shifts to the non-moving party to demonstrate why summary judgment would be inappropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). In making its determination, the court must view all evidence and any factual inferences in the light most favorable to the, nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Cow.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

III. FACTS

This case has a long and complex history, which we set forth at length in our opinion of July 2, 1999, reported at 52 F. Supp.2d 1364 (M.D. Ala. 1999), and which we will therefore not recount here. Rather, we shall focus our attention on the particular claims raised by Brown with regard to HD 73.

Daniel Brown resides at 3409 North Water Mill Road, in the Carriage Hill subdivision in the City of Montgomery, which is part of HD 73. House District 73 lies entirely within the city limits of Montgomery. According to 1990 census figures, HD 73 is 10.52% black and 88.15% white. The total population of HD 73 is 40,396.

Brown's claim that HD 73 was racially gerrymandered focuses primarily on the belief that the district is "too white." *See* Brown Depo. at 14:14-17. According to Brown, the voting districts of Alabama should be racially integrated like the schools were integrated to better reflect the communities. *See id.* at 69:23-70:10. Both the state defendants and the Sinkfield defendants have moved for summary judgment on Brown's claims against

HD 73, arguing that Brown has not provided evidence to support an essential element of his claim.

IV. DISCUSSION

The United States Supreme Court first recognized a cause of action under the equal protection clause of the fourteenth amendment for claims of racial gerrymandering in *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993). Courts analyze these types of claims in two steps. First, a court determines whether to apply the strict scrutiny afforded to classifications based on race, by examining whether the challenged districting plan, "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts based on race." *Id.* at 649, 113 S. Ct. at 2828. The Supreme Court further explained the requirements for satisfaction of this element in *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 2488 (1995), stating that strict scrutiny should be applied only where race is the "predominant factor" in the drawing of district lines. Plaintiffs may prove that race was predominant through evidence that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* Once the court has determined that strict scrutiny is appropriate, it proceeds to the second step of *Shaw* analysis: consideration of whether the district lines were narrowly tailored to further a compelling state interest. *Shaw*, 509 U.S. at 658, 113 S. Ct. at 2832.

The defendants in this case focus their arguments on the first element of Brown's *Shaw* claim. They contend that Brown's evidence does not support the conclusion that race was a factor in drawing the boundaries of HD 73. The defendants therefore argue that HD 73's boundaries are not subject to any equal protection analysis, much less strict scrutiny. We agree.

First, Brown relies on the evidence provided by two expert witnesses to support his claim that HD 73 was racially gerrymandered.[3] Neither expert's testimony supports Brown's claim that HD 73 was racially gerrymandered, however. The first expert, Dr. Ron W. Weber, makes several conclusory statements indicating that "race was a predominant factor" in the drawing of a long list of legislative districts in Alabama, but he does not provide any specific evidence suggesting that racial considerations predominated in the creation of HD 73 in particular.[4]

Brown's second expert, Dr. William Stewart. provides little support for Brown's claim against HD 73. Dr. Stewart points only to the fact that areas with a minority population of more than 65% were "shut out" of the district to support his theory that "[b]lacks appear to have been deliberately excluded from House District

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[3] *See* Corrected Thompson Plaintiffs' Consolidated Response in Opposition to Sinkfield Defendants' Motions for Summary Judgment and State Defendants' Motions for Partial Summary Judgment filed on November 22, 1999, at 39 (Doc. # 248).

[4] *See* Exh. E, at 17-18.

73."[5] Dr. Stewart does not specify specific "black" areas that were excluded from HD 73, nor does he address the implications that adding such people to the district would have on the total population of the district. HD 73 has a population of 40,936, 4.97% above the ideal population for a house district in Alabama. Adding additional people to the district may likely violate the one person, one vote requirements of the Constitution and may also undermine the traditional districting factor of compactness. Dr. Stewart only makes a generalized conclusion about the population of HD 73, without designating specific areas that were excluded or discussing specific areas that could be removed from HD 73 if areas with higher black populations were added, to comport with the traditional districting factors of compactness and keeping communities of interest together. Therefore, this report provides little specific support to Brown's claim that HD 73 was gerrymandered.

In addition to the expert reports, Brown makes two arguments regarding the population composition of his district. First, Brown argues that HD 73 is "too white." *See* Brown Depo. at 14:16. He doesn't believe that his district reflects his neighborhood, where he shops or where he goes to church. *See id.* at 14:22-15:8 & 25:16-18. Brown asserts that certain blocks of black voters were left out of his district, making the district more white. *See id.* at 25:20-22.

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[5] Stewart Report at 6. Exh. D to Plaintiffs' Response in Opposition to State Defendants' Motion for Summary Judgment Against Plaintiff Andrew D. Thompson, Jr., filed on October 28, 1999 (Doc. #225).

The defendants offer evidence to illustrate that the dividing lines of HD 73 under the Reed-Buskey Plan had little impact on the racial composition of HD 73. HD 73 was going to be a majority white district no matter how the lines were drawn using traditional districting principles. For example, under the Pokey Plan, HD 73 was 88.14% majority white.[6] The Reed-Buskey Plan changed it to 88.15% white. Consequently, merely because HD 73 is "too white" does not illustrate that race was a predominant factor in the drawing of the district. The Shaw majority has recognized that the "racial composition of a particular voting district, without more," is not enough to support a claim for a violation of the equal protection clause of the fourteenth amendment. *Hays*, 515 U.S. at 746.

Brown's second population argument is that HD 73, and all other house districts for that matter, should be integrated like the school system was integrated. *See* Brown Depo. 69:2370:10. Brown believes that neither whites nor blacks can negotiate for districts. *See id.* at 74:17-75:17. Further, when asked who should construct the districts, Brown stated, "Somebody much smarter than us. Like the courts did in terms of integration and that kind of stuff like that." *See id.*

The *Shaw* majority specifically rejects this "integration" argument, however. In *Hays*, the appellees urged the court to consider their district, "a 'segregated' voting

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[6] *See* Exh. 52 filed on December 15, 1999 (Doc. #283). Plaintiff's counsel described the Pokey Plan at the Hearing held on December 17, 1999, as "the 1983 district with the 1990 census information." Hearing Transcript, December 17, 1999, at 123:13.

district, and thus, that their position [was] no different from that of a student in a segregated school district." *Hays*, 515 U.S. at 746. The Court found, however, that "an allegation to that effect does not allege a cognizable injury under the Fourteenth Amendment." *Id.* Consequently, this court also rejects Brown's "integration" argument.

Finally, Brown attempts to demonstrate that race was a motivating factor in the drawing of HD73 through the testimony of Dr. Joe Reed, a central negotiator of the current plan. Dr. Reed has openly stated that his role in the districting process was to represent the interests of black voters, and that his primary goal was to increase black representation in the Alabama legislature. However, Brown has produced no specific evidence that Dr. Reed had race-based motivations in drawing the boundaries of HD 73. General evidence about Dr. Reed's goals in drawing the state-wide districting plan as a whole is not sufficient to show that HD 73 in particular was drawn for racial reasons.

In addition to their other evidence, the defendants have presented evidence that race was not the predominant factor in drawing HD 73. First, defendants have produced evidence to show that HD 73 comports with the traditional factor of compactness. HD 73 is among the most compact districts in terms of perimeter and dispersion. HD 73 is the fifth most compact district in terms of perimeter out of the 105 districts and it ranks 37th out of the 105 districts in terms of dispersion. The defendants have also presented evidence that HD 73 reflects incumbent preferences. Perry Hooper, Jr. was the incumbent representative of HD73. Representative Hooper testified

in his deposition that he didn't have any problem with the way his district was drawn under the Reed-Buskey plan and that "the lines virtually were very similar to the way they were in 1983." *See* Hooper Depo. 30:14-15. Hooper asked Dr. Reed to keep his district similar to the way it was. *See id.* at 73:3-4.

V. CONCLUSION

For the above reasons, it is hereby ORDERED that summary judgment should be GRANTED in favor of the defendants on Brown's claims regarding HD 73. A separate order will be entered in accordance with this Memorandum Opinion.

Expert Witness Report
Thompson et al. v. Smith, CA 97-A-715-E
David A. Bositis
October 8, 1999

INTRODUCTION. I have been asked by James Blacksher of Birmingham, Alabama (representing the Sinkfield parties) to examine the organization and activities of the Alabama Democratic Conference, the New South Coalition, and the Jefferson County Citizens Coalition and to assess whether these organizations are functionally equivalent to political parties. Mr. Blacksher has provided me with copies of depositions from Joe Reed and Jerome Gray of the Alabama Democratic Conference, Richard Arrington of the Jefferson County Citizens Coalition, Henry Sanders of the Alabama New South Coalition, and John Rice, one of the plaintiff intervenors in the Sinkfield action. Mr. Blacksher also requested that in examining these organizations from the perspective of political parties that I also address issues of democracy and representation that are tied to political parties.

I am a political scientist and long-time scholar of political parties and I have conducted research and published extensively in that area. I am also a nationally recognized scholar of black politics, and am presently senior political analyst at the Joint Center for Political and Economic Studies, a nonpartisan research institution in Washington, DC that specializes in black studies. Finally, I am also regarded as a voting rights scholar, and I have been an expert witness in two federal voting rights cases, *Hays v. Louisiana* and *Johnson v. Mortham*.

POLITICAL PARTIES AND DEMOCRACY.

Political party theorists are in agreement that political parties and party competition are essential to democracy. In E.E. Schattschneider's words "Political parties created democracy . . . modern democracy is unthinkable except in terms of parties"[1] While there are several areas of disagreement among political party theorists, this perspective (regarding parties and democracy) represents a consensus view.

PARTY SYSTEMS.

Political parties function within party systems. Party systems are based in durable patterns of interactions and conflict between social groups, and include at least two political parties as units which compete against each other in electoral and governing institutions and result in predictable consequences and behavior among party leaders.

In terms of the state legislature, Alabama appears to have had what might be termed a modified one-party system at the time of the 1990s reapportionment. In 1992, 78.1 percent (82 of 105) of the members of the Alabama House were Democrats, and 80 percent (28 of 35) of the members of the Alabama State Senate were Democrats.[2] In consequence, much of the significant political conflict transpired within the Democratic party. Often in one-

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[1] E.E. Schattschneider (1942) *Party Government*. New York: Farrah and Rinehart.

[2] **SOURCE:** The National Conference of State Legislators.

party states, intra-party competition is based on factions. This was not the case in Alabama. Factions are shifting groups of competing elites who are not linked to popular followings. The competition that took place in the Alabama legislature and within the Alabama Democratic party was between functional political parties. The social groups' (represented by the Alabama Democratic Conference, the New South Coalition, and the Jefferson County Citizens' Coalition[3]) politically salient interactions – including conflict – with the other 'Democratic' parties (as well as with the Republicans) in the legislature are part of a durable and long-term pattern. This pattern includes competition in elections and government, and is associated with generally predictable consequences among party leaders. Rather than a one-party system in the Alabama legislature, there was a situation more closely approximating a *multi-party* system.

POLITICAL PARTIES.

A political party exhibits a structure or organization; links leaders to a popular following, which includes generating an in-group perspectives and having symbols of party identification among leaders and followers; and it

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[3] From the depositions of the leaders of these three organizations, it is clear that while functioning as political parties, they each do so within a circumscribed geographical area. The Alabama Democratic Conference is a statewide organization (save one county), The Jefferson County Citizens' Coalition functions primarily in Jefferson County, and the Alabama New South Coalition functions in approximately 20 counties.

contests elections, and seeks offices and power in government[4].

In the American context, political parties are *cadre* parties as opposed to *mass* parties.[5] Cadre parties have a relatively small leadership group (or cadre) and also usually a somewhat larger – but still small – number of activists, who are usually volunteers. Near election time, the number of people active in party affairs swells, only to recede once the election is over. Mass political parties, typified by European Socialist parties, have large, relatively permanent (or long-term) memberships. Members pay dues, are given membership cards, and engage in party activities on a year-round basis.

The two largest American parties, the Democratic party and the Republican party, have official party organizations at the national, state, and local level. The relationships between the different organizational levels are generally *stratarchical*,[6] that is, power is not completely top-down, as in a bureaucracy, but rather it is based on a *reciprocal deference structure* in which leaders at all levels act independently but also defer to each other. There are matters that occasionally, but rarely, arise where higher level organizations demand acquiescence from lower level organizations.

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[4] Baer, Denise L. and David A. Bositis (1994), *Politics and Linkage in a Democratic Society*. Englewood Cliffs, NJ: Prentice-Hall.

[5] Maurice Duverger (1954), *Political Parties*. New York: John Wiley & Sons, Inc.

[6] Samuel J. Eldersveld (1964), *Political Parties: A Behavioral Analysis*. Chicago: Rand McNally.

Political parties generally have a party charter and party rules. Party leaders are elected by party members – usually delegates at party conventions. Parties have a party platform, which identifies the party's formal principals and issue positions and does so in a public fashion. Parties have organizational meetings, including conventions, and if the party is organized at different levels (state, local), it usually has conventions and other meetings relevant to the different levels of the party. Parties generally have a permanent headquarters with staff and volunteers. Finally, parties engage in issue advocacy and they spend money on public communications and media in connection with that advocacy.

As noted above, American parties are *cadre* style parties, and do not have mass membership. The voters who support a party at election time, but who otherwise do not participate in any party affairs are generally referred to as the *party-in-the-electorate*.[7] The vast majority of Americans do **not** participate in party affairs. However, most Americans do identify with a political party. For most people, party identification is a subjective state, which is associated with certain in-group perspectives, and is likewise associated with an individual's voting choices.

The relationship between a party and its followers in the electorate is based upon a number of factors. First, the party is widely recognized as representing the interests – and identifiers – of those groups associated with the

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[7] V.O. Key (1964), *Politics, Parties, and Pressure Groups*. New York: Thomas Crowell.

party (*e.g.*, the GOP and the Christian Coalition and the Democratic party and organized labor). The formal principles of the party are generally ones its followers subscribe to. Elected officials and candidates publicly identify themselves by the party label, and to a significant degree personify the party to followers (a role also played by the party's chairman or chairwoman). Political parties communicate with their followers, especially with regard to their endorsements and candidate slate. Finally, the media reports on the activities and positions of political parties, including coverage of their conventions and candidates.

As noted above, parties contest elections, and seek offices and power in government. In order to contest (and win) elections, parties raise and spend money on election-related (and organizational) activities, including GOTV (get out the vote) efforts. When possible, political parties use the reapportionment process to gain electoral, and hence political, advantage; district lines can be drawn that distribute likely supporters – and opponents – in such a way as to enhance a party's chances of electoral success, *i.e.*, gerrymandering. Parties also train their campaign workers, including candidates, volunteers, and poll watchers. And, of course, parties slate and endorse candidates. Parties not only recruit and support candidates, but also candidates generally seek the endorsement of the party.

In order to influence (*seek power*) government, parties generally have party organizations in legislative bodies[8] (*e.g.*, the Democratic Caucus or the Republican Conference). Parties usually have a party 'program' in the legislature (however specific or general) for which it lobbies support (*e.g.*, the Contract with America). The legislative program is connected to the party's principles and public program. As part of this process, parties occasionally have to enforce party discipline in order to facilitate the enactment of their party program. The nature of this party discipline varies, but often includes withholding resources, withdrawing endorsements, recruiting and supporting opponents at election time, denying favorable committee assignments, and in extreme cases, removing members from favored committees (*e.g.*, Democrats in the U.S. House tossed U.S. Senator (then Representative) Phil Gramm (TX) off the House Budget Committee).

In sum, the overall democratic process has freely associating citizens organized as a political party with the intention of contesting elections and seeking power. The principles and objectives of the party are what attracts support from the *party-in-the-electorate*, and once elected, the party seeks to implement its objectives in the best way possible, including contesting elections and formulating a legislative agenda. Thus, political party organizations represent the representational linkage between followers, whose principal political activity is voting, and

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[8] In American political party literature, this is referred to as the *party-in-office*, a term coined by V.O. Key [see note 7].

legislators (and other public officials) who pass legislation and raise and spend money as part of the governmental roles.

THE ALABAMA DEMOCRATIC CONFERENCE.

Based upon the criteria outlined above, and reading the depositions of Joe Reed and Jerome Gray of the Alabama Democratic Conference (ADC), I concluded that the Alabama Democratic Conference is a functioning political party – in all but name only – at the state and local level in Alabama. I will review the activities and organization of the ADC based upon the depositions.

The ADC is a cadre style organization with a significant membership, but by no means is it a mass membership party. There are both members and volunteers in the ADC. The organization of the ADC, like the two major parties, is stratarchical with respect to the component organizations in the ADC. According to the depositions, there is a state committee, county-level committees (which predominate), and local committees in the ADC. In making endorsements, members from relevant jurisdictions, *e.g.*, counties, have the principal voice in determining who the ADC endorses for county-wide office. A committee of the statewide organization makes similar decisions regarding statewide candidates and issues.

The ADC has a formal charter and party rules and by-laws. Officers are elected by the membership. The ADC has a formal statement of principles, and publicly takes positions on a variety of political issues. The ADC holds regular organizational meetings at both the state

and county level, including conventions twice a year. The ADC has a permanent headquarters with paid staff as well as numerous volunteers. Finally, the ADC engages in on-going issue advocacy with regard to its primary agenda which is aimed at improving the lives of the black citizens of Alabama.

While the membership of the ADC is comparatively small, as indicated above, the ADC – like other American political parties – is a cadre style party. While the ADC does not have a large membership (relative to the electorate or to the black electorate), a large proportion of black voters in Alabama identify with the ADC, just as some white citizens identify with the Republican party. These citizens – mostly black – view the ADC as representing their interests in Alabama politics. They (the black identifiers with the ADC) generally favor the party's principles and issue positions. They are aware of the ADC and its program through the communication and outreach efforts of the ADC itself, but also through the mass media, which publicizes the ADC; the media coverage reflects a recognition of the ADC's relationship with a substantial portion of the black electorate in Alabama.

There are black members of the state legislature and other black officeholders in Alabama who publicly identify themselves as ADC members and supporters, and this influences ADC identifiers' vote choices. Probably two of the most prominent public symbols of the ADC are its chairman, Joe Reed, and its yellow sample ballot. Candidates for public office, white and black, appear before ADC screening committees, to seek the endorsement of the ADC for their election races. Those candidates – again black and white – who receive the ADC's

endorsement generally receive the support of the ADC's identifiers.

The ADC as a party, operates within the larger Democratic party, and thus does not have a separate ballot line such as third parties like the Libertarian Party or the Reform Party. The ADC only endorses Democratic candidates. It has not become a formal third party because the ADC does not believe that the isolation of Alabama's black citizens, who are in the minority, would achieve the goals of the ADC. By working with white Democrats (and others) and engaging in the give-and-take and compromise of everyday politics within the Democratic party, the ADC seeks equity for Alabama's black citizens. However, it remains an independent organization by raising its own money, selecting and supporting its own slate in the Democratic primaries, formulating its own agenda, and endorsing – or failing to endorse – Democratic nominees in the general election. Independent parties frequently endorse the nominees of other (in the U.S., the Democrats and Republicans) parties. The Reform party (associated with H. Ross Perot) and the Liberal and Conservative parties in New York and New Jersey, often endorse Democratic and Republican candidates if they believe their endorsements would further their party's interests.

One of the ADC's principal goals in contesting elections is to get more black candidates nominated and elected to office, and to get sympathetic [with the ADC's goals] white Democrats nominated and elected. In order to achieve this goal, the ADC raises money and engages in a variety of election related activities. Like other political parties, the ADC has attempted to use the reapportionment process to distribute (in legislative districts)

their likely supporters – and opponents – to their advantage (see Reed deposition).[9] The ADC trains volunteers and members to engage in a variety of electoral activities, including running for office, communicating with voters, and poll watching. The ADC has a major GOTV effort every election cycle. Depending on the circumstances, the ADC both encourages and discourages black candidates to seek office. Part of the long-term election activities of the ADC is to research the vote of ADC supporters (identifiers), and to communicate that knowledge to those considering running for office.

There are a number of members of the legislative black caucus in the Alabama legislature who are ADC supporters, and these members frequently meet with the ADC. At the ADC's last convention, there were several black legislators in attendance. Each legislative session, the ADC has a number of items comprising its agenda, and the ADC leadership lobbies the legislature – both black and white members – to obtain support for that agenda. This is a process that often involves compromising and 'horse trading', but occasionally it requires the ADC to 'enforce party discipline'. In the past, when legislators have received endorsement and other support from the ADC, and once elected, break their commitments to the ADC or immediately lose their interest in the ADC agenda, the ADC has withdrawn their endorsements, encouraged opposition candidates in the primaries, and otherwise sought to 'punish' the errant legislator.

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[9] In his deposition, Jerome Gray discussed the ADC's knowledge (and research) of where its electoral supporters, and opponents, were located.

In conclusion, the ADC functions much as a political party functions. There is a cadre style party organization at the state, county, and local level. There is a formalized party structure with rules and regular procedures, and well articulated principles. The ADC serves as a link between its identifiers in the electorate and the state government, with its political leverage based upon the support of its identifiers in the election process.

THE JEFFERSON COUNTY CITIZENS COALITION.

Again, based upon the criteria outlined above, and reading the deposition of Richard Arrington of the Jefferson County Citizens Coalition (JCCC), I concluded that within the context of Jefferson County, the JCCC is a functioning political party. I will review the activities and organization of the JCCC based upon the deposition.

The JCCC is a cadre style organization with a comparatively small membership, and not a mass membership party. There are both members and volunteers in the JCCC. The organization of the JCCC, is unlike the two major parties and the ADC, since it is primarily based in Jefferson County, and hence does not require different levels of organization. According to ex-Mayor Arrington's deposition, there are different committees in the JCCC which deal with various issues and activities.

The JCCC has a formal charter[10] and party rules and by-laws. Officers are elected by the membership. The JCCC has a formal statement of principles, and publicly

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[10] See deposition of Richard Arrington.

takes positions on a variety of political issues. The JCCC holds regular organizational meetings. The JCCC has a permanent headquarters with a small staff. At different times in the past, the JCCC has had paid staff, and at others none. Finally, the JCCC engages in on-going issue advocacy with regard to its primary agenda which is largely aimed at improving the lives of the black citizens of Jefferson County.

While the membership of the JCCC is small, the JCCC – like other American political parties – is a cadre style party. While the JCCC's membership is small, a significant proportion of black voters in Jefferson County identify with the JCCC and its objectives. These citizens are mostly black, and they view the JCCC as representing their interests in county and state politics. They (the black identifiers with the JCCC) generally favor the party's principles and issue positions. They are aware of the JCCC and its program through the communication and outreach efforts of the JCCC itself, but also through the media in Jefferson County, which publicizes the JCCC; the media coverage reflects a recognition of the JCCC's relationship with a substantial portion of the black electorate in Jefferson County.

There are a small number of black members of the state legislature and other black officeholders, principally in Jefferson County, who publicly identify themselves as JCCC supporters. At the present time, probably two of the most prominent public symbols of the JCCC are its chairman, and (long-time) Birmingham ex-Mayor Richard Arrington, and its white sample ballot (which has ex-Mayor Arrington's picture on it). The JCCC has procedures for endorsing candidates for public office, and

the JCCC endorses both white and black candidates. Unlike the ADC, the JCCC is not affiliated with the Democratic party. However, ex-Mayor Arrington indicated in his deposition that the JCCC rarely, if ever, endorses Republican candidates in general elections. Those candidates – again black and white – who receive the JCCC's endorsement generally receive support from the JCCC's identifiers.

The JCCC is an independent organization not affiliated with any other party. It does not have a separate ballot line such as third parties like the Libertarian Party or the Reform Party. When it endorses, the JCCC generally endorses Democratic candidates in general elections. However, it is an independent organization, it raises its own money, it selects and supports its own slate in the Democratic primaries, focuses on its own agenda, and endorses – or fails to endorse – Democratic (usually) nominees in the general election. As noted above, small independent parties often endorse the nominees of other parties.

One of the JCCC's principal goals in contesting elections is to get more black candidates nominated and elected to office, and to get sympathetic [with the JCCC's goals] white candidates nominated and elected. In order to achieve this goal, the JCCC raises money and engages in a variety of election related activities. The JCCC trains volunteers and members to engage in a variety of electoral activities, including running for office, communicating with voters, and poll watching. The JCCC has a GOTV effort in Jefferson County every election cycle. Unlike the ADC, which is associated with the Democratic

party, the JCCC is not as likely to discourage black candidates from seeking office, even if their prospects are questionable.

There are a few members of the legislative black caucus in the Alabama legislature who are JCCC supporters, and these members meet with the JCCC and its leadership. Since the JCCC is based in Jefferson County, its influence is largely derived from its influence there.

In conclusion, the JCCC functions much as a political party functions. There is a cadre style party organization at the county level. There is a formalized party structure with rules and regular procedures, and well articulated principles. The JCCC serves as a link between its identifiers in the electorate and county (and state) government, with its political leverage based upon the voter support from its identifiers in Jefferson County.

THE ALABAMA NEW SOUTH COALITION.

Based upon the criteria outlined above, and reading the deposition of Henry Sanders, chairman of the Alabama New South Coalition (ANSC), I concluded that the Alabama New South Coalition is a functioning political party in about a third of Alabama's counties and consequently also at the state level in Alabama. I will review the activities and organization of the ANSC based upon the depositions.

The ANSC is a cadre style organization with a modest membership, and not a mass membership party. There are both members and volunteers in the ANSC. The organization of the ANSC, like the two major parties, is

stratarchical with respect to the component organizations in the ANSC. According to the deposition, there is a state committee, county-level committees in the counties where the ANSC is active, and local committees in the ANSC. In making endorsements, members from relevant jurisdictions, *e.g.*, counties, have the principal voice in determining who the ANSC endorses for county-wide office. A committee of the statewide organization makes similar decisions regarding statewide candidates and issues.

The ANSC has a formal charter and party rules and by-laws. Officers are elected by the membership. The ANSC has a formal statement of principles, and publicly takes positions on a variety of political issues. The ANSC holds regular organizational meetings, including a convention once a year. The ANSC has a permanent headquarters with a small paid staff as well as numerous volunteers. Finally, the ANSC engages in on-going issue advocacy with regard to its primary agenda which is aimed at improving the lives of the black citizens of Alabama.

While the membership of the ANSC is comparatively small, as indicated above, the ANSC – like other American political parties – is a cadre style party. While the ANSC does not have a large membership relative to the black electorate, a significant proportion of the black voters in those counties in Alabama where the ANSC is active (and not in competition with the ADC and other organizations) identify with the ANSC. These citizens – mostly black – view the ANSC as representing their interests in county and Alabama politics. They (the black identifiers with the ANSC) generally favor the party's

principles and issue positions. They are aware of the ANSC and its program through the communication and outreach efforts of the ANSC itself, but also through the mass media, which publicizes the ANSC; the media coverage reflects a recognition of the ANSC's relationship with a substantial portion of the black electorate in Alabama.

There are black members of the state legislature and other black officeholders in Alabama who publicly identify themselves as ANSC members and supporters. Chairman Sanders is a member of the Alabama State Senate. Presently two of the most prominent public symbols of the ANSC are its chairman, Senator Sanders, and its blue sample ballot. Candidates for public office, white and black, seek the ANSC's endorsement for their election races. Like the JCCC, the ANSC is less likely than ADC to discourage black candidates from entertaining improbable election contests. Those candidates – again black and white – who receive the ANSC's endorsement generally receive significant support from ANSC's identifiers.

The ANSC, like the JCCC is independent, and not affiliated with the Democratic party. While the ANSC has no rule (like the ADC) against endorsing Republicans, Senator Sanders in his deposition indicated that the ANSC in practice does not endorse Republican candidates. The ANSC is an independent organization, raising its own money, selecting and supporting its own slate in the Democratic primaries, formulating its own agenda, and endorsing – or failing to endorse – Democratic nominees in the general election.

As with the ADC and JCCC, the ANSC's principal goals in contesting elections is to get more black candidates nominated and elected to office, and to get sympathetic [with the ANSC's goals] white Democrats nominated and elected. In order to achieve this goal, the ANSC raises money and engages in a variety of election related activities. The ANSC trains volunteers and members to engage in a variety of electoral activities, including running for office, communicating with voters, and poll watching. The ANSC has a major GOTV effort every election cycle.

There are a number of members of the legislative black caucus in the Alabama legislature who are ANSC supporters, including Senator Sanders. The ANSC's legislative supporters meet with the ANSC and discuss legislative issues and strategies. Like the ADC, the ANSC has a number of items comprising its legislative agenda, and the ANSC leadership lobbies the legislature – both black and white members – to obtain support for that agenda.

In sum, the ANSC functions much as a political party functions. There is a cadre style party organization at the state, county, and local level. There is a formalized party structure with rules and regular procedures, and well articulated principles. The ANSC serves as a link between its identifiers in the electorate and the state government, with its political leverage based upon the support of its identifiers in the election process.

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Vita March, 1999

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EXPERIENCE

1990-Present. Senior Research Associate, The Joint Center for Political and Economic Studies, Washington, DC.

1988-1990. Associate Professor, Department of Political Science, State University College – Potsdam, Potsdam, NY.

1982-1988. Assistant Professor, Department of Political Science, The George Washington University, Washington, DC.

PUBLICATIONS

BOOKS

Bositis, David A. (ed.) 1998. *Redistricting and Minority Representation: Learning from the Past, Preparing for the Future.* Washington, DC: The Joint Center for Political and Economic Studies.

Bositis, David A. 1994. *The Congressional Black Caucus in the 103RD Congress.* Washington, DC: The Joint Center for Political and Economic Studies.

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Bositis, David A. 1997. "Some Thoughts on the 2000 Reapportionment" *Congressional Black Caucus Foundation Forum* (September 1997). Washington, DC: Congressional Black Caucus Foundation.

Bositis, David A. 1997. "The Current State of American Pluralism" *E Pluribus Unum? A Symposium on Pluralism and Public Policy.* Washington, DC: The American Jewish Committee Belfer Center for American Pluralism.

COMMENTARY

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Bositis, David A. 1996. "The Farrakhan Factor" *The Washington Post,* December 8.

Bositis, David A. 1996. "A Look at the Battle for Congress" *The Washington Post,* September 29.

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Bositis, David A. 1992. "Will Term Limits Help?" *FOCUS,* 20:7.

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Bositis, David A. 1998. *Joint Center for Political and Economic Studies 1998 National Opinion Poll: Education.* Washington, DC: The Joint Center for Political and Economic Studies.

Bositis, David A. 1998. *Joint Center for Political and Economic Studies 1998 National Opinion Poll: The Environment and Economic Development.* Report for the EOP Group. Washington, DC: The Joint Center for Political and Economic Studies.

Bositis, David A. 1998. *Joint Center/Fortune Magazine Poll: Black Professionals Attitudes toward Corporate America.* Washington, DC: The Joint Center for Political and Economic Studies.

Bositis, David A. 1997. *Joint Center for Political and Economic Studies 1997 National Opinion Poll: Race Relations.* Washington, DC: The Joint Center for Political and Economic Studies.

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Bositis, David A. 1997. *Joint Center for Political and Economic Studies 1997 National Opinion Poll: Revolution.* Washington, DC: The Joint Center for Political and Economic Studies.

EXPERT TESTIMONY & OTHER LEGAL WORK

Bositis, David A. 1995. *Report of Dr. David A. Bositis, October 13, 1995.* Hays v. Louisiana, U.S. District Court for the Western District of Louisiana.

Bositis, David A. 1996. *Report of Dr. David A. Bositis, January 2, 1996.* Johnson, *et al.* v. Mortham, *et al.*, U.S. District Court for the Northern District of Florida.

Associate Justice John Paul Stevens cited my research in his dissenting opinion in *Bush v. Vera*, 1996.

Bositis, David A. 1997. "The Impact of Race on Pretrial Release Decisions in the Second U.S. Circuit from July 1993 through June 1996" Study conducted for the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness (New York City)

Bositis, David A. 1997. *Report of Dr. David A. Bositis, November 2, 1997.* Sinkfield, *et al.*, *v.* Bennett, State of Alabama, Circuit Court of Montgomery County.

AFRICA

Benin Project. I have travelled to Benin in French West Africa five times over the course of 1996-1997 to work with nongovernmental organizations (NGO) in conducting electoral studies. The results from the first completed study on the 1996 Beninoise Presidential Election were presented at a conference in Cotonou, Benin in September 1997. At that conference I spoke on the importance of electoral research in democratic societies.

PUBLIC PRESENTATIONS

1999

March The Anti-Defamation League of B'nai B'rith, Office of National and Government Affairs, Washington, D.C. **Presentation before the National Black-Jewish Task Force.**

The Sentencing Project, One Washington Circle Hotel, Washington, DC. **Presentation on Race and the Permanent Disenfranchisement of Felons.**

February The Coleman A. Young Detroit Democratic Club, Detroit Athletic Club, Detroit, Mi. **Keynote Speaker, Presentation on the 98' Black Vote and the Black Agenda for 1999-2000.**

January The College Board Government Affairs Committee, Hampshire Hotel, Washington, DC. **Presentation on the 98' Midterm Elections and Education Issues.**

U.S. Department of State, Foreign Service Institute, 41*st* Senior Seminar, NFATC, Arlington, VA. Presentation on Polling and Governance.

1998

December. The Center for Economic Opportunity, National Press Club, C-SPAN, Washington, D.C. **Panel: Race in the 1998 Midterm Elections.** (Other Panelists were Linda Chavez, Stuart Rothenberg, and Tom Edsall).

Democratic National Committee & Donors, Mayflower Hotel, Washington, DC. **Presentation on the Black Vote in the 1998 Midterms.**

November. Joint Center for Political and Economic Studies, Board Dinner, Washington, DC. **Presentation on 1998 Midterm Elections.**

Institute for Educational Leadership, Washington, DC. **Presentation on 1998 Midterm Elections.**

October. Joint Center for Political and Economic Studies, National Press Club, Washington, DC. **Presentation on the 1998 Joint Center National Opinion Poll.**

September. National Black Conservative Leadership Conference, Washington, DC. **Presentation on 1998 Elections and Prospects for Black Conservatives' Agenda and Candidates.**

Congressional Black Caucus Weekend/Braintrust Panel: **Political Power in the Black Community: The Next Generation.**

August. National Governors' Association Meeting, Milwaukee, WI. Luncheon Speaker, Corporate Fellows Luncheon. **Presentation on the 1998 Midterm Elections.**

July. Annual Meeting of the NAACP, Atlanta, GA. **Presentation on Elections and Generational Issues.**

Annual Meeting of National Association of Black Journalists, Washington, DC. **Speak on Press Coverage of Black Elected Officials** (Other Panelists: Sen. Carol Moseley-Braun, Reps. John Lewis and Mike Espy, Gwen Ifill, and Sonya Ross)

June. First Thursday Session of the New Synthesis Group, Washington, DC. **Presentation on Black Politics and Generational Issues.**

Annual Meeting of National Newspaper Publishers Association, Memphis, TN. **Presentation on Generations and Politics, 2000 Census, and Redistricting.**

Brown Bag Lunch at Economic Policy Institute, Washington, DC. **Presentation on Black Politics and Generational Issues.**

May. NAACP Legal Defense and Educational Fund, New York, NY. **Presentation on Voting Rights and Black Political Participation.**

April. Democratic National Committee (Senior Staff). **Presentation on Black Politics and the Democratic Party.**

1997

November. National School Boards Association, Council of Urban Boards of Education, Doubletree Hotel, Tucson, AZ. **Panel: School Vouchers.**

September. Republican National Committee, New Majority Council, Hyatt-Regency Capitol Hill, Washington, DC. **Panel: The Republican Party's Prospects with Minority Voters.** Other panelists were Ed Goeas of the Tarrance Group and Wes Anderson of Fabrizio, McLaughlin & Associates.

September. Senior Symposium, Senior Class and Faculty, Lynchburg College, Lynchburg, VA. **Presentation: Voting Rights in America.**

August. First Annual Operation Push/Rainbow Coalition Convention, Chicago Hilton, Chicago, IL. **Panel: The 2000 Presidential Election.** The other panelists were former New York City mayor David Dinkins, NAACP President Kweisi Mfume, and Robert Borosage of the Economic Policy Institute. Rev. Jackson was the moderator.

August. Forum on Renewing the Voting Rights Act organized by U.S. Rep. Cynthia McKinney (D-GA), U.S. Capitol, House Ways and Means Committee Hearing Room, Washington, DC. **Panel: The Persistence of Racially Polarized Voting.** Other panelists were SCLC President Dr. Joseph Lowery, Brenda Wright of the Lawyers' Committee for Civil Rights, and Professor J. Morgan Kousser of the California Institute of Technology.

July. Arthur F. Burns Fellowship Program. International Center for Journalists, Washington, DC. **Topic: Race and Politics.**

June. Joint Center for Political and Economic Studies, National Press Club, Washington, DC. Release of

Joint Center's 1997 National Survey on Race Relations. Other Panelists included Joint Center President Eddie Williams, former Mississippi Governor William Winter, and Black Leadership Forum Executive Director Yvonne Scruggs.

January. National Commission on Civic Renewal, Sam Nunn and Bill Bennett, Co-Chairs, Plenary Session, Hotel Washington, Washington, DC. **Testimony on Race and Civil Society.**

January. Joint Center for Political and Economic Studies, Sheraton-Carlton, Washington, DC. **Panel: The 2000 Reapportionment and Minority Representation.**

REPORTS (Continued)

Bositis, David A. 1996. *The Black Electorate in 1996: A Profile of Congressional Districts.* Washington, DC: The Joint Center for Political and Economic Studies.

Bositis, David A. 1996. *Joint Center for Political and Economic Studies 1996 National Opinion Poll: Political Attitudes.* Washington, DC: The Joint Center for Political and Economic Studies.

Bositis, David A. 1996. *Declining Propensity to Serve: Survey Analysis.* Washington, DC: The Joint Center for Political and Economic Studies.

Bositis, David A. 1995 (unpublished manuscript). *Blacks and Jews in the 103RD Congress.* Washington, DC: The Joint Center for Political and Economic Studies.

Bositis, David A. 1995. *Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South.* The Joint Center for Political and Economic Studies (Joyce Foundation).

Bositis, David A. 1993. *The Congressional Black Caucus in the 103RD Congress.* The Joint Center for Political and Economic Studies (Ford/Joyce Foundation).

Bositis, David A. 1993. *Black Elected Officials: A National Survey.* The Joint Center for Political and Economic Studies (Ford Foundation).

Bositis, David A. 1993. *African-Americans and the 1992 Elections.*

Bositis, David A. 1994. *Blacks & Hispanics in Redistricting: The Impact of Voter Participation on Representation and as a Source of Conflict between Minority Groups.*

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Bositis, David A. 1994. "African-Americans & the 1994 Midterms: What Happened?" Washington, DC: Joint Center for political and Economic Studies.

Baer, Denise L., David A. Bositis and John S. Jackson, III. 1991. "The 1988 Party Elite Study." *Vox Pop,* 10:3-5.

Bositis, David A. 1991. "Jake Arvey," "Julian Bond," "Herbert Croly," "Carmine DeSapio," "Jim Farley," "Donald Fraser," "Harold Gosnell," "Frank Hague," "George McGovern," "Roberto Michel," "Elite Theory," "Experimental Research on Parties," "McGovern-Fraser Commission," "Party Reform," "Responsible Party Debate" in L. Sandy Maisel (ed.), *Encyclopedia of Political Parties and Elections.* New York: Garland.

Bositis, David A. 1988. "Some Observations on the Participant Method." *Political Behavior,* 10:333-348.

Bositis, David A. and Doug Steinel. 1987. "A Synoptic History and Typology of Experimental Research in Political Science." *Political Behavior,* 9:263284.

Bositis, David A. 1985. "Design Strategies for Theory Testing: The Efficient Use of Field Experimentation in Political Science." *Political Behavior*, 7:374-387.

Bositis, David A., Denise L. Baer and Roy E. Miller. 1985. "Cognitive Information Levels, Voter Preferences and Local Partisan Political Activity: A Field Experimental Study of the Effects of Timing and Order of Message Presentation." *Political Behavior*, 7:266-285.

Baer, Denise L. and David A. Bositis. 1983. "The Political Socialization of Gender: What Contribution Biology?" *Politics and the Life Sciences*, 1:125-134.

Baer, Denise L. and David A. Bositis. 1983. "Authors' Response." *Politics and the Life Sciences*, 1:140-142.

Baer, Denise L. and David A. Bositis. 1983. "Biology, Gender and Politics: An Assessment and Critique." *Women and Politics*, 3:29-55. Also appears in Meredith W. Watts (ed.), *Biopolitics and Gender*. New York: Haworth.

Bositis, David A. and Roy E. Miller. 1982. "The Successful Communication of Cognitive Information: A Study of A Precinct Committeeman" in M. Burgoon (ed.), *Communication Yearbook 6*. Beverly Hills: Sage.

Jackson, John S. III, Barbara Brown and David Bositis. 1982. "Herbert McClosky and Friends Revisted." *American Politics Quarterly*, 10:158-181.

Miller, Roy E., David A. Bositis and Denise L. Baer. 1981. "Stimulating Voter Turnout in a Primary Election: A Field Experiment with A Precinct Committeeman." *International Political Science Review*, 2:445-460.

Baer, Denise L., David A. Bositis and Roy E. Miller. 1981. "A Field Experimental Study of A Precinct Committeeman's Canvassing Efforts in a Primary Election: Cognitive Effects" in M. Burgoon (ed.), *Communication Yearbook 5*. New Brunswick: Transaction Books.

IN THE FIFTEENTH JUDICIAL CIRCUIT

MONTGOMERY COUNTY, ALABAMA

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, AND ANDREW HAYDEN, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS, VS. JIM BENNETT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE STATE OF ALABAMA, DEFENDANTS.	)	CV-93-689
JOHN RICE AND CAMILLA L. RICE, INDIVIDUALLY AND ON BEHALF OF A CLASS OF NON-AFRICAN-AMERICAN VOTERS, INTERVENING PLAINTIFFS.	)	

Testimony of Jimmy Clark

* * *

[439] Q ALL RIGHT. AND IN THE PROCESS, THERE WERE COMMENTS, AND THERE WERE LEGISLATORS OR OTHER REPRESENTATIVES THAT HAD BILLS THAT THEY WANTED THE COMMITTEE TO CONSIDER; IS THAT CORRECT?

A THAT'S CORRECT.

Q ALL RIGHT.

A MR. CAMPBELL HAD A BILL; MR. CURRY AND MR. BOX HAD A BILL; MR. PERDUE FROM BIRMINGHAM HAD A BILL. JUST ABOUT EVERYBODY AND HIS BROTHER [440] HAD A BILL THAT THEY WANTED. ALL OF THEM WERE DIRECTED . . .

Q ALL RIGHT.

A MOST OF THEM WERE DIRECTED AT GETTING ME OUT OF THERE, MY DISTRICT, SO THAT THEY COULD ELECT A NEW SPEAKER.

Q ALL RIGHT. AND ACTUALLY, THESE BILLS WERE VOTED ON AS AMENDMENTS, WERE THEY NOT?

A THEY WERE. THERE WERE – MOST OF THEM WERE ALLOWED TO, IF THEY COULD GET ENOUGH SECONDS. I DON'T KNOW IF ALL OF THEM GOT A SECOND OR NOT. MOST OF THEM WERE CONSIDERED BY THE COMMITTEE. A LOT THEM WERE TURNED DOWN BY THE COMMITTEE, BUT SOME OF THEM – WHEN THEY TOOK IT BACK AND REPORTED OUT, I'VE FORGOTTEN WHAT THE COMMITTEE'S BILL, WHAT EXACTLY THAT WAS; BUT THAT'S WHEN WE DEFEATED THAT AND CAME WITH A VOTE ON THE SO-CALLED REED PLAN.

Q AND SO IS IT SAFE TO SUMMARIZE THE PROCESS TO SAY THAT IT WAS A VERY CONTESTED MATTER OR ISSUE THAT CAME BEFORE THE HOUSE AS FAR AS GETTING A PLAN APPROVED?

A VERY MUCH SO.

Q ALL RIGHT. AND YOU MENTIONED THAT A NUMBER OF PEOPLE HAD PLANS BUT NONE OF

THOSE PLANS [441] PASSED EXCEPT THE ONE THAT ULTIMATELY WE ARE TALKING ABOUT HERE TODAY?

A THAT'S CORRECT.

Q ALL RIGHT. NOW, DO YOU KNOW JOE REED?

A YES.

Q AND DO YOU KNOW HIM AS CHAIRMAN OF THE ALABAMA DEMOCRATIC CONFERENCE?

A YES.

Q AND DID YOU HAVE THE OCCASION TO – FIRST OF ALL, LET ME ASK YOU THIS: JOE REED REPRESENTS A CONSTITUENCY; IS THAT CORRECT?

A THAT'S CORRECT.

Q AND WHAT DO YOU UNDERSTAND HIM TO – WHO HIS CONSTITUENCY IS?

A HIS CONSTITUENCY IS BASICALLY THE BLACK MEMBERS OF THE DEMOCRATIC, THE ALABAMA DEMOCRATIC CONFERENCE.

Q WHICH CONSISTS PRIMARILY OF BLACK CITIZENS IN THE STATE?

A AND SOME FEW WHITE; YES.

Q AND SOME WHITE. ARE THERE OTHER POLITICAL ORGANIZATIONS, BLACK POLITICAL ORGANIZATIONS IN THE STATE THAT YOU ARE AWARE OF?

A YES. WE'VE GOT THE NEW SOUTH ORGANIZATION WHICH IS THERE; AND THERE ARE OTHERS, I'M [442] SURE, BUT NOT OF ANY SIGNIFICANCE.

Q ALL RIGHT. NOW THERE IS ALSO THE JEFFERSON COUNTY COALITION THAT OPERATES OUT OF JEFFERSON COUNTY, IT OPERATES ESSENTIALLY IN THAT COUNTY. ARE YOU FAMILIAR WITH THAT ONE?

A YES.

Q ALL RIGHT. BUT AS FAR AS STATEWIDE, A.D.C. AND THE ALABAMA NEW SOUTH COALITION ARE TWO THAT YOU ARE FAMILIAR WITH THAT OPERATE STATEWIDE?

A YES.

Q OKAY. AND THEY HAVE A PRIMARILY BLACK CONSTITUENCY?

A NEW SOUTH IS KIND OF - IT'S REGIONAL, REALLY. IT'S HEAVY IN SOME AREAS, BUT IN OTHERS, THEY DON'T HAVE - I DON'T BELIEVE THEY HAVE AN ORGANIZATION IN BARBOUR COUNTY, AND MANY OF THOSE TYPE KINDS, MIDDLE-SIZED AND RURAL COUNTIES.

Q IN BARBOUR COUNTY, DOES A.D.C. HAVE A VIABLE -

A YES. THEY'VE ALWAYS BEEN VIABLE, BECAUSE WE ARE A HEAVILY POPULATED BLACK COUNTY.

Q HAVE YOU RECEIVED THE ENDORSEMENT OF THE A.D.C. FROM -

[443] A I'VE ALWAYS RECEIVED THE ENDORSEMENT OF THE A.D.C. I'VE ALWAYS RECEIVED THEIR VOTE WITH A HIGH PERCENTAGE OF THE BLACK VOTERS EVERY TIME I'VE RUN.

Q ALL RIGHT. NOW SPEAKING SPECIFICALLY OF THE PLAN THAT'S BEEN – AND YOU HAVE BEEN IN THE COURTROOM, SO YOU HAVE HEARD A LOT OF TESTIMONY THAT WAS DISCUSSED HERE TODAY. LET'S GO DIRECTLY TO THIS PLAN. WHAT WERE YOUR CONCERNS WHEN YOU AGREED TO THIS PLAN? THIS IS A PLAN THAT YOU SUPPORTED; IS THAT CORRECT?

A THAT'S CORRECT.

Q ALL RIGHT. WOULD YOU TELL THE COURT WHY YOU SUPPORTED THIS PLAN?

A I SUPPORTED THIS PLAN BECAUSE IT KEPT TOGETHER MANY OF THE RURAL COUNTIES OF ALABAMA; AND IN PARTICULAR, I WAS INTERESTED IN IT MORE SO IN THE EASTERN PART, BECAUSE THAT'S WHERE I LIVE. AND WE WORKED WITH – YOU MENTIONED MISS GUILLOT, AND HER PROBLEM. WE WORKED WITH HER. WE WORKED WITH PEOPLE ALL THE WAY UP AND DOWN TO THE LINE, TRYING TO GET ENOUGH PEOPLE TO, YOU KNOW, PUT TOGETHER TO HAVE SOME RURAL REPRESENTATION. WE WANTED TO CONTINUE TO HAVE [444] RURAL REPRESENTATION. THE TREND, OF COURSE, NOW IS THAT YOU'RE GOING TO QUIT HAVING ANY RURAL REPRESENTATION; YOU'RE GOING TO BE BACKED UP. IN THE NEXT CENSUS, YOU'LL BE BACKED UP AGAINST CITIES LIKE DOTHAN ON THE

SOUTH, AND PHENIX CITY, AND AUBURN AND OPELIKA ON THE NORTH. SO DAYS ARE NUMBERED FOR MY TYPE OF COUNTY AND MY TYPE OF REPRESENTATION.

Q ALL RIGHT. NOW, YOU DID PERSONALLY NEGOTIATE WITH JOE REED AS FAR AS THIS PLAN WAS CONCERNED, AND YOU MENTIONED MISS GUILLOT AND OTHERS; IS THAT CORRECT?

A YES.

Q AND DID YOU CONSIDER YOURSELF TO BE IN A NEGOTIATING PROCESS AS FAR AS GETTING WHAT YOU NEEDED OUT OF THIS PLAN?

A I CONSIDERED MYSELF TO BE IN A LIFE OR DEATH STRUGGLE FOR HOLDING ONTO A POLITICAL SEAT FOR BARBOUR COUNTY, FIRST, AND THAT WAS MY OBJECTIVE. AND, OF COURSE, MR. REED HAD, YOU KNOW, A LARGE GROUP OF BLACK MEMBERS IN MY COUNTY AND ALL OF THE SURROUNDING COUNTIES, SO NATURALLY, I WORKED WITH THEM.

Q AND IN THE PROCESS OF – WELL, WOULD YOU EXPLAIN WHY YOU FELT YOU WERE IN A LIFE OR [445] DEATH SITUATION?

A WELL, YOU KNOW, IN 1970, WHEN JUDGE JOHNSON HAD THIS REAPPORTIONMENT – HAD A FELLOW IN NEW HAMPSHIRE DRAW UP A PLAN, THEY SPLIT BARBOUR COUNTY INTO FOUR HOUSE SEATS AND THREE SENATE DISTRICTS. THEY ALL CAME INTO EUFAULA. FOR NINE YEARS, EUFAULA NEVER – I MEAN BARBOUR COUNTY NEVER HAD A

SINGLE ROAD OR ANYTHING THAT WAS DIVIDED UP BETWEEN THE COUNTIES. WE NEVER GOT ANY FOR NINE YEARS UNTIL THEY GOT - UNTIL THAT WAS CHANGED IN '83. AND SO, I REALIZED WHAT REAPPORTIONMENT OR WHAT REVISED REAPPORTIONMENT CAN DO TO DESTROY THE ECONOMIC INTEREST OF A COUNTY; AND I WAS FIGHTING FOR MY CONSTITUENCY TO SEE THAT THEY WERE GOING TO BE REPRESENTED IN MONTGOMERY.

Q ALL RIGHT. SO ONE OF YOUR CONCERNS WAS THAT YOU DIDN'T WANT BARBOUR COUNTY, AT LEAST, SPLIT UP LIKE IT HAD BEEN IN 1970?

A THAT'S CORRECT.

Q NOW, YOU WERE AWARE THAT SOME PLACES HAD TO BE SPLIT; IS THAT CORRECT?

A YES.

Q BUT YOU DIDN'T WANT BARBOUR COUNTY SPLIT?

[446] A THAT'S CORRECT.

Q AND THAT'S ONE OF THE REASONS WHY YOU SUPPORTED THE PLAN?

A YES.

Q NOW, THERE WERE PEOPLE WHO WERE ACTUALLY - WELL, LET ME ASK YOU THIS: WOULD YOU TELL THE COURT WHY, IF YOU KNOW, SOME OF THE OTHER PLANS WERE DRAWN. DID THEY HAVE A PURPOSE, IN TERMS OF YOUR SEAT?

A YES. SOME OF THEM – THE PREMISE, I THINK ON ALL OF THEM, WAS: THE FIRST THING YOU DO IS GET RID OF THE SPEAKER'S DISTRICT; AND THEN YOU MOVE TO TRY TO PUT TOGETHER A COALITION THAT YOU CAN – WHETHER IT'S IN JEFFERSON, OR IF IT'S THE REPUBLICANS OR THE DIFFERENT GROUPS, THEY WOULD COME TOGETHER. I THINK THERE WAS ONE, REPRESENTATIVE PERDUE, HE HAD ONE; SOME VOTER GROUP IN WASHINGTON OR SOMEPLACE WAS WORKING WITH HIM. MR. BOX AND MR. CURRY HAD ONE. MR. BOX FROM MOBILE AND MR. CURRY FROM JEFFERSON. IT WAS AIMED AT MORE REPRESENTATION IN URBAN AREAS. MR. CAMPBELL HAD A PLAN BECAUSE HE WANTED TO BE SPEAKER OF THE HOUSE. LET ME THINK. RIGHT OFF, THERE WERE ABOUT FIVE DIFFERENT PLANS [447] FLOATING AROUND, ALL OF THEM – THEY ALL HAD SIMILAR MOTIVES, YOU KNOW; IT WAS EITHER TO PUT SOME INDIVIDUAL IN A BETTER POSITION TO MAKE A MOVE TOWARDS A LEADERSHIP POSITION, OR At LEAST TO GET MORE REPRESENTATION FOR URBAN INTEREST.

Q AND IN SOME OF THESE PLANS, THEY TENDED TO CARVE UP BARBOUR COUNTY, FOR EXAMPLE?

A WELL, ALL OF THEM DID; YES, SIR.

Q AND SO, IS IT A FAIR STATEMENT TO SAY THAT THERE WAS A LOT OF POLITICKING GOING ON AS FAR AS THESE DISTRICTS –

A YES, SIR.

Q - AND GETTING THE VARIOUS PLANS -

A THAT'S CORRECT.

Q - APPROVED?

A THAT'S RIGHT. VERY MUCH SO.

Q AND, IN EFFECT, ALL OF THESE PLANS WERE DEFEATED; IS THAT CORRECT?

A THAT'S CORRECT.

Q AND THE PLAN THAT WE HAVE BEEN IN COURT ON TODAY IS THE ONE THAT ULTIMATELY PASSED THE HOUSE?

A THAT'S CORRECT.

Q AND, IN YOUR OPINION, WHAT DID IT TAKE TO GET [448] THIS PLAN PASSED BY THE HOUSE?

A WE HAD TO BE SURE THERE WAS A SUFFICIENT NUMBER OF SEATS TAKEN CARE OF THAT WE COULD GET TO VOTE ON THE FLOOR, THAT WE WERE ABLE TO DO THAT.

Q AND DID THIS PLAN ACCOMMODATE WHITE REPRESENTATIVES?

A OH, YES. IT ACCOMMODATED WHITE AND BLACK.

MR. DAVIS: I THINK THAT'S ALL I HAVE, YOUR HONOR.

THE COURT: ALL RIGHT. MR. MONTIEL.

MR. MONTIEL: ALL RIGHT, SIR.

CROSS EXAMINATION

(BY MR. MONTIEL:)

Q MR. SPEAKER, DID ANY PLAN GET THE SUPPORT OF THE SENATE?

A NO, SIR.

Q WHAT WERE THE REASONS FOR THAT?

A I REALLY CAN'T SAY EXCEPT THEY HAVE A HISTORY OF NOT PARTICULARLY FOLLOWING THROUGH ON CONTROVERSY OR ANY OTHER TYPE OF LEGISLATION TO THE BENEFIT OF THE PEOPLE OF THE STATE OF ALABAMA.

* * *

[467] Q JUST THAT PART, MR. SPEAKER. WHEN IT WAS ACTUALLY SUBMITTED TO THE COURT, WHAT, IF ANYTHING, DID YOU DO TO GET THE PLAN SUBMITTED TO THE COURT BY THEN SECRETARY OF STATE CAMP AND THEN ATTORNEY GENERAL OF ALABAMA, JIMMY [468] EVANS?

A OH, I THINK WE MAY HAVE DISCUSSED IT WITH CAMP. I BELIEVE HE SAID IT WAS ALL RIGHT. I THINK I DISCUSSED IT WITH JIMMY EVANS, AND I BELIEVE HE SAID IT WAS ALL RIGHT.

Q DID EITHER MR. CAMP OR MR. EVANS EXPLAIN TO YOU THESE MAPS THAT I'VE SHOWN YOU TODAY OR THE EFFECT IT WAS GOING TO HAVE ON THE DISTRICTS IN ALABAMA?

A WE DIDN'T – I DIDN'T GO INTO GREAT DETAIL WITH THEM.

Q WAS THERE ANY DISCUSSION OR WERE YOU AWARE OF THE FACT THAT THE DISTRICTS, THE MAJORITY BLACK HOUSE DISTRICTS WERE UNDER-POPULATED FROM THE IDEAL IN 25 OF 27 DISTRICTS?

A I CAN'T SAY THAT. I KNEW A LOT OF THEM WERE CLOSE. WE WENT OVER A LOT OF THEM. WE WENT THROUGH AND SAW WHAT THE BLACK-WHITE WAS AND WHETHER IT WAS OVER OR UNDER ON ALL OF THEM.

Q ALL RIGHT.

A BUT I DIDN'T FORM ANY FIRM FEELING ABOUT THAT, IN DOING THAT, EXCEPT: DO WE HAVE THE VOTES? YOU KNOW, IN THE LEGISLATURE, IT IS: DO YOU HAVE THE VOTES TO PASS SOMETHING?

Q BUT WE ARE PAST THAT POINT.

[469] A YEAH.

Q THE LEGISLATURE IS THROUGH. ALL OF THESE FOLKS ARE RUNNING DOWN TO COURT. THE RICE'S [sic] WEREN'T IN IT THEN. THEY RAN OVER TO THE FEDERAL COURT, AND THEY RAN OVER TO THE STATE COURT, AND EVERYBODY FILED THE LAWSUIT. IN FACT, THESE FOLKS RIGHT HERE BROUGHT A LAWSUIT. (POINTING TO MR. DAVIS.)

THE COURT: JUST ASK YOUR QUESTIONS. ASK HIM WHAT DID HE DO.

Q AT THAT POINT IN TIME, AFTER THE LAWSUIT WAS BROUGHT AND THE LEGISLATURE IS THROUGH, WHAT -

A DID I DO ANYTHING?

Q YES, SIR.

A NO. I FELT LIKE THAT WAS OUTSIDE OF MY DOMAIN.

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TRIAL TESTIMONY OF ROBERT J. NORELL
JANUARY 20, 2000

ROBERT J. NORELL, DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

MR. STILL: May it please the Court.

This is Doctor Robert J. Norell who is a professor of history at the University of Tennessee. He has previously taught history at the University of Alabama and at Birmingham Southern College. His field of specialization is twentieth [694] century American History and the history of the American South. He is the author of several books and numerous articles. His 1985 award-winning book Reaping the Whirlwind: The Civil Rights Movement in Tuscaloosa has recently republished in a revised edition.

Q. Is that correct, Doctor Norell?

A. Yes.

Q. Did we – that is, the lawyers representing the Sinkfield parties in this case – ask you to research the history of black political organizations in Alabama and the history of the reapportionment process in Alabama?

A. Yes.

Q. How did you go about trying to answer those questions for us?

A. I used the method that I use in any research project, which is to reading secondary literature, primary documents that pertain to these particular issues, and in some cases I did some interviews.

Q. Based on your historical reading, did blacks participate in political associations in Alabama in the late 19th century; that is, after they were freed?

A. Yes.

Q. And what sort . . . When exactly did these associations begin to appear?

A. They appeared as soon as the African-Americans were [695] enfranchised in 1867 in Alabama. Organized originally through the union leagues, voting membership in the Republican party. A little later in the 19th century some African-Americans aligned with the third party candidates, being the Populists.

Q. Did these political associations disappear after the 1901 constitution?

A. Once the vast majority of African-Americans were disenfranchised, yes, there were relatively fewer. There was little cause to be organized politically.

Q. When did these associations begin to reappear?

A. They began to reappear in the 1930's when gradually a few African-Americans, primarily in cities in Alabama, began to get registered to vote and began to be politically active.

Q. And did these . . . Under what types of names did these associations go?

A. Well, they emerged as civic associations. For example, the Tuskegee Civic Association, there was the Jefferson County Progressive League, the . . . ultimately the Montgomery Improvement Association were all civic and political organizations at the same time.

Q. Is your book, Reaping the Whirlwind, partly about the Tuskegee Civic Association?

A. Yes, it is.

Q. How was the Alabama Democratic Conference begun?

A. The Alabama Democratic Conference emerged from the [696] creation, in 1960, of the Southern Democratic Conference, which was an organization of southern African-Americans originally meeting in Atlanta to help the candidacy of John Kennedy whom they supported. The people who went to that meeting from Alabama came home and created the Alabama Democratic Conference as the state arm of the Southern Democratic Conference.

Q. And the Alabama Democratic Conference that we know today is the continuation of that same organization?

A. That's right.

Q. All right. Are there other significant black political associations now in Alabama?

A. Yes. There are statewide . . . other statewide organizations, like the New South Coalition. There are organizations that are essentially city organizations, such as the Citizens Coalition in Jefferson County.

Q. Have you reached a conclusion as to whether black political organizations have represented a broad community of political interests among black voters?

A. Yes.

Q. What is your conclusion on that?

A. My conclusion is that the political organizations, like the Alabama Democratic Conference or the New South Coalition or the Citizens Coalition, all represent the perception among African-Americans that they have common political interest and that they should act in common to pursue this interest.

[697] Q. Turning now to the issue of legislative redistricting. Have you studied that issue in Alabama?

A. Yes.

Q. And generally tell us why the legislature refused to redistrict from 1901 until 1964 as required by the Alabama constitution.

A. Well, typically that is explained, essentially, by the concentration of power in the legislature among people who had a strong community of interest themselves – that is, essentially the white planter interest in the black belt – and they had a highly disproportionate influence, especially over time, in the legislature. And they simply refused to honor the constitutionally mandated reapportionment.

Q. After the Reynolds versus Simms decision, what was the first priority among legislators, according to your research, after they had complied with the . . . while they were complying with the one-person, one-vote mandate?

A. Well, once reapportionment actually happened, we saw in Alabama in the reapportionment of the legislature, as we had seen in other reapportionment activities historically, the first commitment is for the protection of incumbents.

MR. STILL: All right. With that, Your Honor, our direct examination of Doctor Norell ends.

We have already produced for the Court – I believe it has been filed with the Court – the report of Doctor Norell [698] with his vitae attached. But if you would like us to, we can mark it as a separate exhibit, which I can have copied –

JUDGE THOMPSON: You say you have already filed it?

JUDGE ALBRITTON: It is in the file in connection with motions. It's not before us at this trial.

Anything like that, you need to offer as an exhibit.

MR. STILL: Thank you, Your Honor. We will get it marked and present that tomorrow morning.

I understand it has already been marked as Exhibit 187.

MR. MARKHAM: My notes indicate that the Sinkfield defendants identified it at some point.

MR. STILL: We move it's introduction now.

JUDGE THOMPSON: Do you have one copy or more than one copy for the Court, Mr. Still?

MR. STILL: I am just checking with Mr. Blacksher.

We will get copies no later than tomorrow morning if you don't have them before you right now.

JUDGE ALBRITTON: All right. Mr. Markham?

CROSS EXAMINATION BY MR. MARKHAM:

Q. Doctor Norell, when did you the prepare this report?

A. I prepared this report, I believe, in October.

Q. October of this year?

A. October of 1999.

Q. And is it essentially the same report you wrote sometime [699] earlier for the state court litigation?

A. Honestly, I don't remember if I wrote a report for the state court litigation. I did testify to the same set of facts and opinions.

Q. Can you tell us what specific information you reviewed with respect to the origins of the current plan and the motivations that went into the current plan in 1993?

A. I did not review the current plan. I only looked at the history of black political organizations and the history of reapportionment.

Q. Do you have any information regarding what percentage of African-Americans in the state of Alabama are members of the Alabama Democratic Conference?

A. No.

Q. Or of the New South Coalition?

A. No.

Q. Or of the Jefferson County Citizens Coalition?

A. No.

Q. Or of the Montgomery Improvement Association?

A. No.

Q. What about the Tuskegee Improvement Association? How many members were there in that?

A. The Tuskegee Civic Association had, at any one time, a few hundred members.

Q. Would you agree that in the 1993 plan, developed by . . . [700] known as the Reed-Buskey plan, that protection of incumbency was as [sic] less important interest than in prior plans?

A. As I said, I did not research the history of particular reapportionment plans; certainly not in the 1990's. So, I don't know the answer to that.

Q. Did I understand you to say that order of interest in incumbency protection was the primary interest and support for the Democrat party candidates would be a secondary interest in the legislature?

A. My opinion is that the protection of incumbency is the primary motivation for decision making in reapportionment considerations and that, as my statement, suggests secondary considerations include partisan concerns, and since 1965, the secondary concern has been the concern for vote dilution of African-Americans and other minority groups.

Q. Until what period of time does your report address this history of Alabama? What is the cut off of time?

A. Well through, say, the mid '80's. The New South Coalition was created in 1986. That is really where I carried my research forward to.

Q. Is there a reason, in preparing a history of redistricting in Alabama, that you stopped in 1986 and didn't come forward to the present time?

A. I stopped at 1986 because that is where my interest on the . . . focus on the black political organizations took me to. [701] I was simply not asked to research the history of the 1990's reapportionment plans.

Q. So, you don't have any information to offer this Court on whether in developing that plan, some other interests may have taken precedence over preserving incumbents' districts?

A. I don't have any information.

Q. And you don't have any information to offer the Court as on whether in 1993 in developing the Reed-Buskey plan some other interest may have taken precedence over maintaining Democratic control of districts?

A. I have done no research other than to sit here and listen to the people who have testified to that today. And that was consistent with what I believe about the primacy of incumbency.

Q. Well, the testimony you heard with respect to the primacy of incumbency do you have any information on whether incumbents were paired in the creation of the 1993 plan? Do you have any information?

A. I'm sorry I don't understand, could you repeat the question?

Q. In developing your report did you look at any time at the number of incumbents who were paired in the preparation of these various redistricting plans?

A. I don't understand what you mean by paired.

Q. Two incumbents placed in the same district and one district left with no incumbent; an open seat?

[702] A. I don't have any information on that.

MR. MARKHAM: I have no other questions.

MR. STILL: Nothing further.

MR. PARK: Nothing further for this witness.

JUDGE ALBRITTON: All right. You have nothing further, Mr. Still?

MR. STILL: No, Your Honor.

* * *

IN THE CIRCUIT COURT FOR

MONTGOMERY COUNTY, ALABAMA

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, and ANDREW HAYDEN, on behalf of themselves and others similarly situated,

Plaintiffs,

vs. CIVIL ACTION NO.

CV-93-689-R

JIM BENNETT, in his official capacity as Secretary of State of Alabama,

Defendants.

JOHN RICE and CAMILLA L. RICE, Individually and on behalf of a class of non-African-American voters,

Intervening Plaintiffs.

* * *

DEPOSITION OF JOE L. REED, taken pursuant to notice and stipulation on behalf of the Plaintiffs, in the Offices of

REAGAN, PRUITT & CLARK
(334) 262-3376

[27] Q. Would you give your full name and address, please?

A. Joe L. Reed, R-E-E-D. Address, 874 John Brown Avenue, Montgomery, Alabama 36106.

Q. Okay. Dr. Reed, are you the – a member of the Alabama Democratic Conference?

A. Yes.

Q. Do you hold an office?

A. Yes.

Q. What?

A. Chairman.

Q. Is that statewide chairman?

A. Yes.

Q. How long have you been statewide chairman of [28] the Alabama Democratic Conference?

A. Since 1970.

Q. And how long have you participated in the activities of the Alabama Democratic Conference?

A. Since 1963, something like that. '62 or '63.

Q. When was the Alabama Democratic Conference founded?

A. 1960.

Q. Okay. What were the circumstances surrounding its founding, and who did it?

A. Well, at that time blacks were shut out of the democratic party. At that time the party had a emblem, a rooster crowing white supremacy. Still blacks – very few blacks could vote. We were still suffering from the legacy of Smith versus Alright, Proprietor Smith versus Alright.

Q. You're talking about the white primary?

A. The white primary. Blacks were not involved in the democratic primary because they were not allowed to be. So there were various black groups formed around the state locally.

[29] For example, the Jefferson County Progressive Democratic Council was one of the organizations.

I'm told that in 1960 when John F. Kennedy was running for president, Congressman William Dawson, a black congressman from Chicago, advised a young senator that there were a few blacks in the South that he ought to try to at least cultivate. Lewis Martin, who was a black journalist, met with a group of blacks from the South in Atlanta.

Q. Martin was connected with Kennedy somehow too, wasn't he?

A. Yes, he was connected with the Kennedy –

Q. Campaign?

A. – campaign. And these blacks met from several states and left with the pledge to go back to their respective states and form state organizations to try to help in that campaign. Arthur Shores –

Q. When you say state organizations, do you mean organizations in the black community [30] specifically?

A. Yes, organizations in the black community because blacks could not participate in the primary – I mean, in the democratic primary. And to some extent, the – these organizations were kind of protest organizations

in one respect because they could not participate in the regular party apparatus.

Arthur Shores was elected chair of the Alabama Democratic Conference. Others involved, Q.D. Adams of Etowah County, David Hood of Jefferson County who lived in Bessemer, Mrs. Beulah Johnson from Tuskegee, Dr. C.G. Gomillion of Tuskegee, plaintiff in the case of Gomillion versus Lightfoot; Rufus Lewis who was a person who had long been involved in voter registration and education in Alabama, and there were numerous others who were – put this organization together including Isom Clemmons who represented the labor organization – the labor union in Mobile, longshoremen. Those were the – some of the founders of the Alabama Democratic [31] Conference.

Arthur Shores served as chairman from 1960 to 1964, then from nineteen – Orzell Billingsley a black attorney from Birmingham served as chairman from 1964 to 1966. In 1966, Rufus Lewis was elected chairman. He served until 1970. In 1970, these gentlemen were what I call seniors to me. I was serving as executive secretary of the Alabama State Teachers Association, and my job required me to travel statewide.

Q. Okay. Before you get to that part and for the Record –

A. Okay.

Q. – Alabama State Teacher Association was the black teacher association at that time?

A. That is correct.

Q. All right. Before you get to your election –

A. Yeah.

Q. – that is before we pass over the founding events that you just described, prior to ADC's founding, had there been black political organizations operating at the local levels in [32] Alabama?

A. Yes.

Q. Could you tell us about those local organizations, and how far back do they go?

A. I mentioned the Jefferson County Progressive Democratic Council. It was formed – I don't know the exact founding date, but many years before. Mobile had the Nonpartisan Voters League that had been formed many years before. The Etowah County Voters League had been formed many years before. In fact, there were various voters leagues and civic leagues formed because that was an outlet by which blacks could express themselves civically and the few blacks that could vote politically.

Q. Now, when you say the few blacks who could vote, how many – how many blacks actually during that era of disfranchisement [sic] were there actually on the rolls?

A. I have those figures someplace. I just don't recall them offhand. But I guess at certain stages 20 to 25,000 statewide, and it grew as time moved on, but –

[33] Q. Were most of them registered in those urban areas that you're talking about now?

A. Well, some were, and some were not, depending on the county. For example, in Montgomery County there were very few blacks registered to vote; in Macon County

there were very few blacks registered to vote. And some other counties, there were more blacks registered to vote, Conecuh County, for example, Walker County, for example. You had a few more blacks registered in some of your larger counties because they could not threaten the white establishment anyway.

[38] Q. Did you – those of you who were registered in Conecuh County, was there a black political organization that operated in Conecuh County?

A. There was a group at that point. Of course, I made a mistake. Now, the Brock uprising – I call it that anyhow – was in the late '40s early '50s. Now, you've got to come down; now you're down in '60 where I am now, so we're a little further down the road.

Q. Okay.

A. But, yeah, there was Conecuh County Civic Association. And all of these organizations precede the ADC. Again, you had various little groups. Even in the teachers association, you had the – what are called the – we call the Vote Commission in the Alabama State Teachers Association where many teachers could not register to vote, but they were encouraged to vote through the vote commission. That group was used to encourage folks to participate. So blacks had various little groups across the state, and even there were women groups. In Montgomery they had one [39] of the groups, I'm told, called the Ten Times One is Ten Club. That little group was encouraging folks to vote. But most black groups had some goals for civic participation. Now, how successful

they were, it varied depending on what county they were in and all of that.

Q. What do you mean by civic participation?

A. Register to vote. They were not – that was essentially the big thing at that time to get be a first-class citizen. In fact, the way blacks were considered to be a first-class citizen was to get registered to vote. If you were not registered to vote, you were not considered a first-class citizen in those days. And Rufus Lewis spent a lot of time going all over the county –

Q. Which county?

A. I'm sorry – all over Alabama to get people to register to vote.

Q. And, now, he was in the black teacher association as well, wasn't he?

A. No. Rufus Lewis was – he was a treasurer of [40] Ross and Clayton Funeral Home. He buried the dead. Rufus Lewis had been a coach at Alabama State University, a football coach, and he finally went and just took his own business, and he spent a lot of his time getting people registered to vote. For example, he was the director of transportation during the Montgomery Bus Boycott, and he just travelled all over Alabama trying to get people registered to vote. He would take a form – that form must have had three or four pages to it, and I guess we didn't realize that it was never intended for us to vote. We spent all of this time trying to get somebody trained and teach them how to pass this test that was not intended for you to pass, and you spent time on that only to – later on the person would deny you and say you just

missed a question, you didn't answer it right. And, of course, all of this pretty much prevailed until the Voting Rights Act of 1965. You had a little break in between, but not much. Blacks did not get any significant political [41] strength in this state until the Voting Rights Act was passed.

Q. Did the ADC operate on a statewide basis during its first decade of operation?

A. Within the first decade, yes. Our structure at one time, once, we were organized more or less on congressional districts. We went to – let me see if I can restate this. We would organize wherever we could. If somebody would agree to be a contact, that would be the contact. You know, self-anointed, self-appointed, didn't matter. We were just trying to get somebody to be a contact for the organization. And in nineteen – but our structure was there was so many seats on the executive board from congressional districts.

In 1970, I became chair. We changed that. We changed it to where our executive board would have one person for every county. At least a county chair of every organization would be on the executive board plus others. So in 1970 that's when we really went statewide in terms of getting [42] someone to act as chair. We would call up and ask somebody, look, will you be acting chair that we can hold an election, and so that's when we did that statewide in each county. So we finally got all the counties pretty much together.

Q. You were only 31 or 32 years old in 1970 when you were first elected chair of the ADC?

A. Yes.

Q. Why you? How did they pick you?

A. Because I was – had been executive secretary of the black teachers association since 1964. I travelled statewide. And one of things that the black leaders wanted to do, they wanted to get an identification with the teachers because many folks thought that the teachers were not involved enough in the political arena. And I had been in the Sit-In Movement –

Q. When you were a student at Alabama State?

A. At Alabama Sate [sic] I was in the Sit-Ins, and I had been student body president at Alabama State, so – and be in the – I had also [43] gained some recognition when Governor Wallace – right after the Selma-to-Montgomery March, we had identified with the teachers, we had identified with the whole Civil Rights Movement, and that was – the Alabama State Teachers Association was one of the first teacher organizations to identify with the Civil Rights Movement, I mean, officially.

Dr. King had spoken before the – at the convention of the Alabama State Teachers Association when the teachers were in Selma trying to get the right to vote. We had backed them and identified with them, had gone to Washington to try to get help for them. We had entered the era what we call – what I call massive litigation in behalf of our members. So the organization had taken on a totally different philosophy, and I think time brought that about.

So in 1970 we were meeting at the Whitley Hotel here in Montgomery –

Q. We being?

A. The Alabama Democratic Conference. Several of [44] the fellows came to me, Arthur Shores and Gomillion, Q.D. Adams, and some of the founders. Somehow they – for some reason they thought that my identification with the teachers association, I think, would help the organization because I travelled a lot, and the organization didn't have any money. So they asked would I serve as chair of the ADC, and I told them, yes, and if they would help me; only if they would help me would I serve as chair. If you help me, I'll do it. And they said they would help me try to build it, and we set out to bring some changes to it, and we did that. We also –

Q. Before you – before you –

A. Yeah.

Q. Tell us also about the incident in which you had stood up to Governor Wallace that had caused you to gain some notoriety among the black political leaders?

A. Oh, yes. In 19, what, 65 after Mrs. Liuzzo was killed, the Selma-to-Montgomery March, Governor Wallace invited the National Press to [45] come to Alabama. And his point was you come to Alabama and look at Alabama yourself. Of course, he had argued that everything – everybody was happy and things were all right and only the outside agitators were causing the problem. So he invited, as I said, the National Press and provided two Trailways busses [sic] to carry them over Alabama. They went to Selma, they went all over the state, and they ended up at Lawson State Community College now. It was called Winona then. Governor Wallace had helped

sponsor, I think, under the Wallace-Cater Act, some act that he sponsored in the legislature to help establish trade schools. He always was very proud of – of Winona, at that time was the name of the school. But what he did, he – being Governor Wallace –

Q. That was a black school?

A. Yes – invited the college presidents to respond to the questions from the National Press. And I was serving as Executive Secretary of the Alabama State Teachers [46] Association. I will call that ASTA from now on. If I say ASTA, that's the same thing, ASTA. So when we got to Lawson State, formerly Winona, one of the reporters asked Dr. Morrison, R.D. Morrison, who was president of Alabama A&M University – Morrison was there, Dr. Levi Washington was there; Smiley was there, president of Trenholm Technical College, two or three others were there, black educators who served as presidents of the various schools. But the question was put: Dr. Morrison, Governor George Wallace said that black people in Alabama are happy and that if the outside agitators would leave them alone, they would be all right. Do you agree with George Wallace on that question, and also what do you think of George Wallace. This was 1965, a very loaded question, one that I never thought Morrison could handle, should have handled. I always thought it was unfair to even invite them all up there.

Q. Why?

A. I thought that was a case where they was [47] intimidating.

Q. How?

A. But putting before the court of public opinion on one hand and the political power structure in Alabama on the other. Blacks had no power at that point.

Q. Who controlled their jobs?

A. The state board of education, and George – and Governor Wallace was chair of the state board.

So I told them, I said, no, don't – Dr. Morrison, don't you answer that question, let me answer that question. Keep in mind I did not work for the State of Alabama. I worked for black teachers of Alabama. And I went on to respond that blacks had been kept in subjugation, blacks had been discriminated against, blacks had been denied the right to vote, and that it was not the National Press – it wasn't the outside agitators that was causing the problem. It was the inside agitators. And I just turned it into a personal press conference. And the [48] papers carried a lot of it that next day. That was the point in my time, I think, that I, because I was very young at that time, became accepted as a spokesperson for black – for black issues pertaining to education and politics.

So after that – that's 1965, and, of course, the Voting Rights Act was passed. Then in nineteen – well, I've already talked about the 1966.

Q. Let's go [sic] your election in 1970 as state chair.

A. Yeah.

Q. Is there any more you want to tell us about that event?

A. Well, I think that what helped influence is the role we had played also in Chicago in 1968.

Q. We being?

A. We being Alvin Holmes and I. What happened at that time, John Cashin had formed this group call the NDPA, the National Democratic Party of Alabama, and he had challenged the regular [49] delegation.

(Brief interruption.)

A. He had formed this – this third party. I had been invited to participate in the third party, and I elected not to because history had thought [sic] me that no third party had survived long. But at any rate, in 1968 in Chicago we were challenged, the regular delegation –

Q. That was the democratic –

A. The regular democratic party of Alabama. Bob Vance was chair. Our seats was challenged because Cashin had said through the national party leaders that this party was a Wallace party and that it would not have any allegiance to the nominee, and, of course, we fought back the challenge.

Q. We being?

A. Those of us who made up the regular delegation of the party. Bob Vance was our chair.

Q. How many blacks were in that regular delegation?

A. Well, the first two blacks – Arthur Shores [50] and I were the first blacks to be elected as delegates to the democratic convention in the century, and Bob Vance had arranged that. He arranged it, because at that time delegates were elected by congressional districts, and Bob – after I qualified for delegate, some other person qualified,

if I remember that right – don't hold me to this now – Mr. Bamberg had qualified.

Q. Red Bamberg?

A. I believe so, qualified for it. And Bob got him to – got him to resign. He resigned because he was going to have to take an oath to support the national ticket. That was a time when Dan Alexander wouldn't sign an oath that he was going to take the national – he was going to support the national ticket and later on repudiated the oath in Chicago.

But to answer your question precisely –

Q. Dan Alexander, for the Record – I don't know what – Dan was a law school classmate of mine. He was from Mobile County and was – [51] what at that time did he hold?

MR. MONTIEL: I'm going to object to the form of the question.

A. Okay. I'll just tell you what he was. He was a lawyer in Mobile who had gotten to be a delegate, and he came to Chicago. And in order for one to get his or her credentials, they had to pledge loyalty to the party; that they were going to support the nominee of the party. Dan Alexander sign [sic] a loyalty oath that he would support the party. No sooner that than [sic] he got his credentials, he went out and repudiated his position, had a press conference he was going to support George Wallace. That's what really happened.

Subsequent to that, several of the Alabamians left the convention, and they were filled in with some blacks and some whites to serve as delegates, but the official two

delegates who left here going to Chicago in 1968 were Arthur Shores and I was one of them.

So on the heels of that, on [52] the – you got to keep in mind this is during the era of massive resistance on the part of Governor Wallace's school desegregation. Harold Howe who was the commissioner of education that was putting guidelines on desegregating public education – a three-judge court had – in the case of Lee versus Macon had issued this statewide desegregation order desegregating public education throughout Alabama. George Wallace was running for national office as president. You got – you still got the Poor People's Campaign that Martin King had started; you got the death of Martin King coming in this era; you got the death of Bobby Kennedy around this same time. So, you know, you got – there's a whole lot going on in this state and then nationwide. And Governor Wallace was calling the legislation a special session to try to, quote, nullify the federal action. I remember testifying in the legislature against some of Governor Wallace's proposals, the only person in Alabama who testified against it, at least [53] the only black who just took it head-on and called it what it was. So all of these things are developing at this time. This is between 1965 and 1970. So '70, I had become known at least, for lack of the better word the loyal opposition, so I was – when I asked to serve as chair of ADC, that's what – that's the atmosphere the time had brought with this.

Q. Okay. Now, you've already described changing from a congressional district structure to a county level –

A. Yeah.

Q. – organization. When you took over as chairman, how many counties were you organized in?

A. We were probably organized in maybe ten.

Q. Okay. And how many counties are you organized in today, ADC?

A. About 60. And we have – and we have contacts in the other counties. Take a county like Winston County. You don't have any blacks in Winston County, so we used to have a contact in Winston County. For example, in Marion [54] County, we had contact there. For example, we used to use the black principals, black educators to either identify somebody or be the contact for us in various counties.

Q. How quickly were you able to grow your county chapters?

A. Well, I guess it took – I'm thinking it took us probably four or five years or six years to get – get them functioning.

Q. Was there a paid staff for ADC when you took over as chairman?

A. At first it was not a paid staff, no.

Q. When did you start with the paid staff?

A. Just a minute. Probably '72 or something like '72, a secretary first, and then later on we got a field director.

Q. Is that Jerome Gray?

A. Yes.

Q. He came on as field director. Well, he's already testified what year it was, but do you remember what –

A. He would know the exact dates, yeah. Whatever date he said, I accept that.

[55] Q. All right.

A. Alvin also served as field director some too, but he was part time.

Q. Alvin Holmes?

A. Yeah.

Q. Okay. To what extent were you successful in organizing black voters to support your leadership in the ADC?

A. We were very successful. For one we had – I said earlier we had the teachers association, which was – was kind of a built-in following. We had – I guess I had been student body president at Alabama State University, which at that time many of the black teachers and students knew me from that. We also had the yearning on the part of blacks to get involved and take advantage of the Voting Rights Act. So oftentimes, we had participation from some counties before we had them fully organized.

Q. Was there any – were you acting on any tradition in the black community when they do get involved in political – the political [56] process to work through their organizations?

A. Yes. We had – what we – we often pressed for unity at the ballot box. We tried to say to the black voter of Alabama, you know, we are a minority, there's strength in numbers, and that we need to, quote, try to stick together. And at that point we were – really weren't

pushing so much to get blacks elected. We were pushing to get respect from white political leaders.

For example, in 1970 one of the first things we did, we said nobody could be endorsed at our pre-primary convention. We were having our convention. We called it the pre-primary convention. And that was we had our convention prior to the democratic primary, and that – one of the things that we required was that in order to get endorsed, you had to come before the organization and ask the organization for its support, and that was in an effort to get respect.

Q. You're talking about the screening committees?

A. The screening committees. The screening [57] committees. And some folks were scared to come, and some didn't come; some did come. But we had a standing policy that if you didn't come, you couldn't get endorsed. That was started in 1970, and it really grew out of a discussion we had in 1966.

We were in Birmingham one evening arguing over what candidate we were going to support in 1966, and –

Q. That was a gubernatorial year?

A. Yeah. And it struck me that we were all arguing about who we were going to support, and no candidate was there. And I remember – you know, I was younger than most of them. I said, what the hell are we doing arguing over these folks; nobody's here to tell us anything, we are arguing over which one we're going to support. I said, let's not support any of them. Well, that didn't prevail at that time. But here we were there, bless our hearts, still learning, debating over Candidate A as

opposed to Candidate B, and neither one of them had enough respect for us [58] to come and ask for our support. When I became chairman, I said, no, that's not going to happen any more. So in 1970, we interviewed all the candidates. We were for Albert Brewer. We went to his office and interviewed him. We were trying to defeat Brewer over Wallace, and we went to the capitol to interview Albert Brewer. But the others who came came before the ADC at the Whitley Hotel.

So – and then the one that stands out to me is the one that Senator John Sparkman, 1972 as I recall it, we sent out our letter asking the candidates – notifying them of the Alabama Democratic Conference Convention. So I'll say 1970 – don't hold me to that date. I don't have my facts mixed up, but my dates may be a little off – I got a call from Senator John Sparkman, and he said, Joe, this is John Sparkman, I got your letter asking me to come to your meeting and, of course, I just can't come; I got to go to Oklahoma. Tell Arthur and all the guys that I [59] really want to be with them, but I can't, and – but I'll be thinking about them and sure counting on you for your support. I said, Senator, you must don't want our support. He said, oh, yes, I got to – I got to have it in order to win. I believe that was the year he was running against Melba Teel [sic]-Allen. I said, well, Senator, we have a rule now that unless you come before our organization, we can't support you. Well, now, when did that happen? I said, recently, we passed that rule not too long ago. He said, oh, I didn't know that. Few days – I mean, a few hours later, Joe, this is John Sparkman; I've checked that thing out in Oklahoma; I just told those folks I got to go

home. He came on, we interviewed him, and we supported him. But the point I'm making is that we were trying – in those days was trying to get the mere respect.

There was another one involving Jim Allen. Jim Allen really didn't need the black vote to get elected in Alabama [60] in those days, but he didn't like going to Washington where 25 percent to 30 percent of your constituents are against you, so he spoke to Bob Vance about that, that he wanted – really wanted to try to get our help. So we had a screening, and Jim Allen came before our screening committee. Peter Hall presided. I told Peter Hall – Peter Hall was the vice chair of ADC for a long time, Judge Peter Hall. So I told Peter Hall, I said, Pete, Senator Allen is coming. I said, now, be sure that the guys treat him with respect, but work him over; be sure you treat him with respect. And Senator Allen got in and made his pitch, and one fellow in the back said, Senator, here you are asking black people to support you, he said, how many blacks do you have on your staff. He didn't have any. But he said, well, I've talked to Dr. Morrison at Alabama A&M, President of Alabama A&M University; I spoke to Dr. Foster, President of Tuskegee University; I spoke to Dr. Levi Washington, President of Alabama State University, and [61] asked them if they could find some young bright black I would employ. The gentleman told him, said, Senator, said, we like Dr. Morrison, we like Dr. Washington, we like Dr. Foster, but you're not before them asking for their vote; you're before this organization, the Alabama Democratic Conference, so if you got a position to fill, the Alabama Democratic Conference is going to have to fill it. I was told that that was Jim Allen's – one of his best lessons in politics, and who told me that,

Jim Allen himself. So the Alabama Democratic Conference has been about also getting blacks involved, not only in just getting people elected, but also to get whites to employ blacks in various ways.

MR. BLACKSHER: Why don't we take a short, five-minute break here. You could use one, and I think the court reporter could use one.

(Brief recess.)

Q. Dr. Reed, would you summarize briefly – I [62] mean, we don't have enough time to go into all the detail I might like – but summarize for us what success ADC has had since you've been chair endorsing successful white candidates, let say, at the state and federal level?

A. Well, we were – as I said earlier one of the first things we sought to do was to get white political leaders in Alabama to respect the black vote by appearing before black people asking them for their support. That was done at our pre-primary convention, which is an annual convention of the Alabama Democratic Conference. We were instrumental in helping Bill Baxley to win the attorney general position of Alabama. We were instrumental in helping numerous other statewide candidates over the years. We were very decisive in helping Senator Heflin when he ran against Walter Flowers for the Senate to succeed Senator John Sparkman. We also were successful in Jim Folsom races, Public Service Commission, when he first ran and several elections thereafter. We were successful in [63] carrying Alabama for President Jimmy Carter when he ran for president. We were successful in – I guess many races. I just can't name all of them. But

throughout the ages since 1970 we've been extremely successful in –

Q. Did you ever play a role in helping Governor Wallace get elected?

A. I don't know whether we did or not. In nineteen – last time Governor Wallace ran, he ran against Albert Brewer – I'm sorry. I'm sorry – George McMillian, George McMillian. We supported George McMillian in the primary, and Governor Wallace defeated him. In the general election, Governor Wallace was facing Mayor Emory Folmar, the republican nominee. The question that we had before us was whether we were going to leave the party, and we said, no, we wasn't going to leave the party; that we would support all the democrats on the tickets because you had a lot of black legislators on that and a lot of white friends of ours too as democrats.

That's what it really came [64] down to. It was never a question to really endorse Governor Wallace. It was a question of whether we would leave the party or not, and we said we were not going to leave the party because it was nothing to leave it for because Emory Folmar offered no more than we thought Wallace offered. And so we decided to stay with the party, and we supported the entire slate with the party. It was never a case of formally endorsing Governor Wallace. Q. So based on your endorsement –

A. All the democrats – all the democrats carried.

Q. Who did the black voters support, and to what extent did black voters follow the endorsement is the question?

A. Oh, they followed it overwhelmingly. I would say probably 80 percent – 70, 80 percent voted straight democratic ticket, straight 80 percent straight democratic ticket or more.

Q. What about the Walter Mondale Jesse Jackson democratic primary?

A. Yeah. That was a very interesting election. [65] Walter Mondale had declared he was going to – was a candidate. Some of us had met with him and – really long before Jesse got into the race, frankly. And Mondale and Jesse was in the primary in Alabama. Several of us met and talked about it. I favored Jesse being vice president on the ticket; to support Jesse for vice president and Mondale for president. And the organization supported Mondale. It was a very close election. It was about – I think it was about 48 to 51 or something like that.

Q. Senator Sanders testified yesterday that it caused quite a commotion at that ADC convention?

A. It did. It did. It caused a big commotion. We met in Mobile at the Hilton Hotel and that the – our organization has what it calls kind of a standard endorsement. The candidate has got to be acceptable and electable. The ADC had encouraged Mondale to run, those of us in the hierarchy, and we kept our word to him. It did cause a big commotion. A lot of blacks were upset about it. More of the younger [66] blacks were upset than the older blacks, but it was – caused quite a bit of turmoil in that.

Q. Well, in those circumstances in that democratic primary, Jackson and Mondale, to what extent did the black voters of Alabama follow your endorsement?

A. About – probably the lowest we've had is probably about 48 percent.

Q. Lowest, you mean by county or over statewide?

A. Statewide about 48 percent supported Mondale and Jackson about 52. Now, Mondale carried Alabama –

Q. Okay.

A. – in Alabama. Because they supported him, he carried Alabama.

Q. When you said lowest you ever had, what do you mean by that?

A. I said lowest – that's the lowest time we've endorsed a candidate that – where we got probably less than 50 percent of the support.

Q. Okay. Were there any other black political organizations endorsing presidential nominees [67] in Alabama at that time?

A. To my knowledge, no.

Q. This was before the New South Coalition was formed according to Sanders' testimony yesterday?

A. Yes. Yeah.

Q. What about white legislators? As early as 1974, were any white legislators elected to the Alabama Legislature with the help of ADC's endorsement?

A. Yes. Montgomery County elected white legislators. We helped elect white legislators throughout the state, because at that time we were putting out a statewide ballot, and we were electing whites almost everywhere – helping elect whites throughout the state,

Mobile, even in places in the Black Belt, some few instances, places in other parts of the state, Walker County. Just all [74] over the state we were endorsing candidates and electing them because people would wait on the yellow ballot to be distributed, and they followed the yellow ballot to the T. Not only were they doing ti in the legislator race, we were doing it in the statewide races.

Q. You mean with respect to white candidates?

A. White candidates, yes. In fact, we had on the supreme court –

Q. Of Alabama?

A. – of – in Alabama. So throughout the state we were electing people and making the difference in our races, because to a large extent, the democratic party was tantamount to election to a large extent.

Q. At that time anyway?

A. Yes, at that time.

Q. Can you say if that's still the case today?

A. No, that's not the case today.

Q. Well, to what extent today do white democrats depend on ADC's endorsement in statewide elections?

A. They depend on it almost a life-blood because [75] the data will show that blacks are still voting 90 percent, 95 percent for the democratic party. I guess the most – last election that I did a major study on was – was the Guy Hunt, Paul Hubert [sic] election because somebody had erroneously put some figures out –

Q. That was the gubernatorial election of what year?

MR. BLACKSHER: Anybody want to help?

MR. MONTIEL: 1990.

THE WITNESS: 1990?

MR. MONTIEL: Wasn't that?

A. Okay – put the figure out that Guy Hunt had gotten 20 percent of the black vote, and there was just no way. We checked all the black boxes –

Q. I'm sorry. Who said that?

A. Natalie Davis had put out a report on that.

Q. Who is Natalie Davis?

A. Natalie Davis is a professor at Birmingham Southern.

[76] MR. WALKER: Birmingham Southern.

A. And she had – she also does polling. And she had made that remark, and it just wasn't the case. And we checked black boxes throughout Alabama, Mobile, Montgomery Wards, the Carver High School box, where it's only black voters, Atmore. We could go all over the state, and our records show that he got about – he may have gotten 3 percent.

Q. Hunt?

A. Yes.

Q. Of the black vote?

A. Yeah.

Q. Is that a regular activity that you conduct of analyzing election returns to see the extent to which black voters follow your endorsement?

A. We do it often, but we don't do it after every election. When I say that, we do not do a thorough analysis, but we do it by looking at the boxes. And the evidence is very clear that blacks are just – support our position anywhere from 80 percent in the primary to 95 percent in the general election.

[77] Q. Can you describe how the endorsements that you've been talking about and black voters in support of your endorsement has provided you influence in the Alabama Legislature?

A. Yes. One thing political leaders understand – that's two things. They understand money and votes. They understand that. That's – they understand that very carefully. And because we have – the Alabama Democratic Conference have unified the black vote, political leaders who seek office come to us and request our support, and we have a procedure by which they may or may not get that support.

Q. That's the screening committee procedure you were alluding to earlier?

A. Yes. Yes.

Q. Okay. We've had a description of that by Jerome Gray –

A. Okay. All right.

Q. – so you don't have to go through the details of that.

A. Okay. We – once you get your friends in [78] office, they will tend to listen to you more than they do if they – if you're not their friend. I mean, that's just common sense. You don't look to your enemies for support; you look to your friends.

Q. Okay. Is your mission and your purpose as -in ADC to try to exclude white people?

A. Not – no. Our purpose is to try to elect as many blacks as we can to public office and as many whites who will be sympathetic to our views. There are more white officeholders in Alabama than there are black. We have supported more white officeholders. We try to support officeholders who are sympathetic to our views, who are sensitive to our needs. In fact, we started off supporting whites long before we supported blacks, and we are one of the few organizations that have supported some whites against some blacks.

And so the Alabama Democratic Conference has a – our purpose and goal is to work to try to make things better for all Alabamians in general – Alabamians in general and black folks in particular. We exist for that purpose.

Q. Okay. What role did ADC play in – or did the ADC have a litigation agenda that was designed [85] to increase the opportunities for blacks to get elected in local elections in Alabama?

A. Yes. That was – what we set out to do in 1970 was to try to get blacks in every chamber of government

in Alabama, not to take over, but get equity; not tokenism, but equity. That was our goal. And that's consistent with our statement earlier that we want to get as many blacks as we can in the public because there are many whites who will cooperate. Because, you know, blacks are a minority in Alabama, so in order for blacks to successfully carry out its political agenda, it's got to have some whites who are sympathetic or sensitive to our needs. You know, you can have a minority of blacks, but unless you got some whites to go with them, you can't pass anything. On the other hand, black children, black citizens, and black political leaders got every right and an obligation to seek and hold public office and to fight for that, and I don't apologize for having to work for whites to get in office and [86] to work for blacks to get in office. I don't apologize for being a democrat. And when I can help, I help. And so the ADC has been about trying to change politics in Alabama, and I think to a large extent we did. I think the ADC was responsible for getting the white supremacy off the ballot where the rooster was on the fence crowing white supremacy. We finally stopped him from crowing white supremacy and more recently replaced him with a donkey. The rooster is no longer the emblem of the party. The donkey is the emblem of the party.

Q. Of the Alabama Democratic Party?

A. Of the Alabama Democratic Party. ADC has always had a donkey for its emblem. When the democratic party had the rooster, we had a donkey for our emblem.

Q. A kicking donkey?

A. Yes. So – but overall, the Alabama Democratic Conference played a tremendous role at all levels of government in influencing the outcome because black voters supported our [87] position. White political leaders and black political leaders come to the ADC basically for one reason, and that was there was some votes that they wanted that we could influence; otherwise, the organization would not have been around since 1960.

Q. Well, let me – before you start talking about that – specifics, why did ADC through our leadership consider it important to get involved in the post-1980 legislative redistricting?

A. Well, for several reasons. One, we wanted to get involved so we could get more blacks elected, get involved so we could get more democrats elected, we wanted to get involved so we could get people sympathetic to education, we got involved so we wanted to help influence the process. I've – the – so there was several reasons for trying to get involved.

Q. And what does redistricting have to do with those objectives?

A. Those objectives particularly they are in education. Most of the monies provided for education in Alabama is provided through state legislature.

Q. My question is, what difference does [90] redistricting make to your ability to do this?

A. I'm sorry. I'm sorry. Over the years, blacks have been – black votes have been diluted, and blacks – the seats that blacks were occupying were there by a court

order from the 1970 election. This is 1980, and we were there in part so that we could get a legislature that would be more sensitive, more friendly to all the people of Alabama and give Alabama leaders – Alabama people, rather, equity and give blacks an equitably fair voice in the legislature. So we got involved in that plan because we detected efforts in the legislature to minimize black voting strength in the legislature, and also – so there was – that's in 1980 coming off the heels of the plan that the court had ordered in 1973.

Q. Okay. Dr. Reed, when we broke I was beginning a series of questions about the 1993 redistricting effort. When did you first get involved in that?

A. Basically, because of the success we had in the 1980 plan, several folk, black legislators in particular had asked that I get involved in the 1991 plan. There was some white legislators too. Of course, the 1983 plan that we – in which we participated was the first plan in the history of the state that had been – that passed the legislature, precleared by justice, and sanctioned by the federal court, so – and one of the things that we were getting ready for, you've got to understand the climate at which we were [95] operating. We're trying to get a plan passed by the Alabama Legislature, so the three things that we had in mind when we would talk to legislators was the blacks certainly wanted me to be the chief negotiator, chief representative for them. Even though there were some other plans advanced, there was also a committee – a joint committee on legislative reapportionment that had looked at some plans, and there was just several different plans out there. I don't remember exactly how many, but it was several. So we set out to draw a plan

that would satisfy basically three things; that would be racially fair, that was – that protected incumbents, and aided democrats. And we said to them that we would talk to them as we went along about what they wanted in the plans and what they didn't want in it, because, again, you've got to try to pass a plan that was – that the legislature would buy.

Q. Who is them?

A. The legislators. Pass a plan that the [96] legislators would support. And there were many legislators who provided input into the plan, and whatever they wanted, we tried to give it to them, because if they didn't vote for it – one of the things that we would always ask them, you know, if we put this in, are you going to vote for the plan. And most said, yes, they would. So we set out to put a plan together based on those three premises. And after we got it drafted, we had a press conference, and we laid it on the table, what we call a commenting period. Here it is, draft one.

Q. Who had the press conference?

A. I did. And told everybody what – what was there and laid it on the table for, I guess, a couple of weeks for commenting periods.

Q. What table did you lay it on?

A. It was in the reapportionment office, told them they could go to the reapportionment office.

Q. Well, explain for the Record a little bit how a person, say a legislator, could go to the – [97] what is the reapportionment office like, and how does the legislator look at a plan over there?

A. The reapportionment office had a staff there, by the – a legislative staff, by the way, and that – they could – they being the legislators, could go by the reapportionment office, look at their maps, and see how their districts was shaped and see whether – as I call it, whether they wanted Sugar Hill in it or Harper Valley, you know, various communities. I used to call it the Sugar Hill Harper Valley Community. It didn't bother me if some legislator wanted Sugar Hill, somebody wanted Harper Valley. If they wanted to change it, we'd change it, because, again, we were trying to get a plan that would pass the legislature, get votes. And one could go by the legislative reapportionment office, talk to the staff, and they could call it to my attention and make some adjustments. In many cases we did make adjustments in the districts during the commenting period. We also had [98] maps. They could look at the maps, and the maps were in color. They could look at the maps and see if that was what they wanted. So that's the way we –

Q. What happened after the commenting period?

A. After the commenting period, we made the adjustments we could make, and the bill was put before the House of Representatives, and then it was voted upon. But the commenting period lasted a couple of weeks, or it might have been a little longer than that.

Q. How did the vote come out?

A. I don't remember, but it was overwhelming. It passed by a good margin.

Q. In the House?

A. In the House, yeah.

Q. But it didn't pass the Senate?

A. No, it did not pass the Senate.

Q. What happened in the Senate?

A. It was killed in the Senate. Ryan DeGraffenried was a – well, he was presiding – he was speaker pro – not speaker pro tem.

[99] Q. He was president?

A. President pro tem, yeah, and he killed it.

Q. Okay. And I assume that the president of pro tem has some special leverage to kill bills that he doesn't like?

A. The president pro tem can kill approximately anything he wants to kill unless the lieutenant governor tells him not to kill it, and sometimes he can kill it still, but . . .

Q. What was Mr. DeGraffenried's objection to the plan, if you know?

A. I'm not sure Ryan ever said other than he didn't like the plan, something to that effect.

Q. Did he make any requests for adjustments that you refused to make?

A. No, huh-uh.

Q. So you're telling me that you don't know exactly what his –

A. Right.

Q. So was there – and there was no other bill – reapportionment bill that did pass both houses?

[100] A. No.

Q. Was there any other bill that passed even one house?

A. I'm not sure, because there was a big – seemed like there was a squabble between the Senate and the House where they were saying that you pass mine first – you pass the House plan first or – and we'll pass the Senate and you pass the House. Seems like to me there was something that got involved in that, but I'd have to go back and reflect my – recheck my memory on that, exactly what transpired, but there was no plan that passed both houses.

Q. Are you suggesting that there might have been one that passed the Senate, but not the House, if you remember?

A. I just don't recall offhand.

Q. Okay. All right. Well, after no plan passed both houses, what did you do then?

A. Well, we were in court, filed an action in court.

Q. You're talking about the Sinkfield versus Bennett?

[101] A. Sinkfield versus Bennett.

Q. Versus Camp, I guess it was, at that time?

A. Yeah. Yeah. And an effort was made then to try to get it – get it accepted.

Q. What I need you to do is to tell me about the – the effort that was made and how you negotiated a settlement of that suit?

A. Oh, at that point, it was very clear that the plan that had passed the House had a lot of sentiment in the House for it based on the vote that was taken. Then I spoke to the Speaker of the House about it and asked that he try to see if we could – might get it settled. He called the attorney general and told the attorney general that – said that the plan that we had drafted, it had had a lot of input from the House members, it had been fair to practically everybody, and that he thought we ought to go on and try to get it settled. And the attorney general, who was Attorney General Jimmy Evans –

Q. And the Speaker the House?

A. And the Speaker of the House.

[102] Q. Was?

A. Jimmy Clark. And the attorney general said he would do what he could and file the necessary motions in court, papers in – motions in court. And, of course, that was done, and the plan was ultimately settled after the court provided fairness hearing, I believe, and let it lay on the table for a while.

Q. Was Evans elected to the office of attorney general as a democrat?

A. Yes.

Q. Was Clark elected to the – to his house district as a democrat?

A. Yes.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ANDREW D. THOMPSON, JR., et al.

vs.

HAL SMITH, JAMES BENNETT, et al.

DARRYL SINKFIELD, et al.

CIVIL ACTION
97-A-715-E
Montgomery, Alabama
January 18-25, 2000

* * *

TESTIMONY ON JANUARY 19, 2000
OF CURTIS TRAVIS

* * *

[425] Q. Let me just understand a little bit more about the contest between ADC and New South in Tuscaloosa.

Now, you have been an ADC member throughout your [426] political career?

A. Yes.

Q. You the New South Coalition is strong politically in Tuscaloosa. Is that right?

A. Yes.

Q. Are most primaries in Tuscaloosa contested between those two organizations? Do they back different candidates generally in the Democratic primary?

A. Yes.

Q. And you testified –

A. Well, not all the time. Typically.

Q. Often. You all win some, New South wins some. Is that right?

A. Well, I will say we win most of them.

Q. But you all didn't win Senator Steele or Bryan Melton's districts?

A. We never contested Bryan Melton district.

Q. Senate Steele's election to senate district 24 was a Democratic primary between the New South Coalition and ADC. Is that right?

A. At that time, yes.

Q. Sally Cook was ADC?

A. Right.

Q. Can you tell the Court of any occasion within Tuscaloosa County, to your knowledge, where a black candidate has run for [427] election and did not receive the endorsement of the New South and ADC so that you can tell the Court that the endorsement was a factor in the election? Otherwise it would be a non-endorsed black candidate, that you are aware of?

A. Yes.

Q. Who was that?

A. Well, let's see. I was fixing to say . . . I was thinking the race for circuit judge with Sue Thompson and Hershey Hamner.

Q. Mr. Hamner is black or white?

A. He is white.

Q. And you all did not endorse the black candidate there?

A. No.

Q. Can you tell the Court the differences between the New South coalition and the Alabama Democrat Conference, you choosing to be a member of ADC?

A. Well, at the time when I first started out there in Tuscaloosa right before I took in, the people were members of both organizations. Time came where there was some changes made from the . . . more from the ADC standpoint, you know, that were we were not allowed to be participants in both political organizations. So, we had, basically, the people who used to be ADC some years ago, went with the New South and then there are some other people, such as myself and former county commissioner Joe Malisham who stayed with the ADC group there [428] in Tuscaloosa.

Q. Is it fair to say the New South coalition and the ADC endorse different candidates, often, in elections whether they and white or black?

A. Yes. Because that came about, the Alabama New South Coalition they endorse Republican candidates where the ADC does not.

Q. New South Coalition permits that type of endorsement?

A. Right.

Q. Is ADC referred to as part of the Alabama Democrat party. Is that my understanding of it?

A. I think some folks . . . I always say Alabama Democrat Conference. Some people want to say it's a black wing of the Democrat party, but it's not. Because, from my understanding, it has always been my perception that New South coalition is also a part of the Alabama Democratic party. And I am also a member of state Democratic executive committee.

* * *

IN THE UNITED STATES DISTRICT COURT
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97-A-715-E
Montgomery,
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* * *

TESTIMONY ON JANUARY 25, 2000
OF GLEN McCORD

* * *

[5] Q. What . . . Have you ever run for public office?

A. Yes, sir. I ran in 1998 for the house of representative district 69 seat. And previously to that I was on the board of education in Wilcox County.

Q. How long did you serve on the board of education?

A. Two years.

Q. And I assume you ran against Mr. Thomas for that house seat?

A. Yes, sir.

Q. Have you affiliated most of this time with either ADC or New South?

A. ADC. Yes, sir.

Q. And is it active in the Lowndes County area?

A. Yes, sir.

Q. Is it . . . Between the New South Coalition and the Alabama [6] Democratic Conference, are those the two predominate black political organizations in that area?

A. Yes, sir.

Q. Would you give us your estimate of the persuasive power, the degree that ADC and New South are able to marshal votes and lead the black community in politics in that area?

A. Most of reputable people that I know are members of those organizations.

Q. So, are you aware of any candidate who has been successful to have local office without the endorsement of at least one of those two organizations?

A. No, sir I am not.

* * *

IN THE UNITED STATES DISTRICT COURT
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* * *

TESTIMONY ON JANUARY 25, 2000
OF BRYANT MELTON

* * *

[85] Q. Okay. Now, do you know Sally Cook?

A. Yes.

Q. And who is she?

A. She is a retired social studies teacher from Holt and the Tuscaloosa County school system. She was president of AEA.

Q. And she is a rival to your political group, isn't she?

A. Well, in 1993 ADC and New South were commingled. In 1993 they were not really opponents as far as Tuscaloosa area politics.

Q. Let me be clear. The two organization . . . You are a member of New South coalition?

A. Yes.

Q. And always have been, haven't you?

A. Yes.

Q. And then the competing organization in certain primaries is the Alabama Democratic Conference that Doctor Reed heads. Is that correct?

A. That is right.

Q. Now, you not are saying that those organizations merged into one organization during 1993, are you?

A. No. I am not saying that. But from the all . . . From the time that New South was organized up until the mid '90's, ADC and New South in Tuscaloosa supported pretty much the same [86] candidate within the county.

Q. Well, didn't you all run different people in the Democratic primary for senate district 24 in 1994, Representative Melton?

A. That's right. It did happen.

Q. And the organizations remain separate?

A. Yes.

Q. When you say you all merged. It's not a merger –

A. It wasn't a merger. But prior to, like, for example, 1994, would have been a test. But prior to that time most of the candidates within the county were supported by both ADC and New South.

Q. The senator that ran for the Democrat primary that you supported was a New South candidate by the name of Charles Steele?

A. That's right.

Q. He is the senator in senate district 24?

A. Yes.

Q. His opponent in the race in the Democratic primary was a lady by the name of the Sally Cook. Is that right?

A. That's right.

Q. Are you familiar with the old state school board districts within Tuscaloosa under to [sic] Reed plan that were drawn?

A. No.

Q. And . . . Let's go to another area. And you are not [87] suggesting that you were encouraging a competitive primary between the ADC and New South coalition, were you?

A. No. When Sally Cook's name surfaced there was not a candidate. No other candidate that we knew of had plan [sic] to run. Charles and several others got in the race after Sally had qualified.

Q. In fact, at the time the Reed-Buskey plan was prepared you were considering running for the seat?

A. Right.

* * *

[95] Q. Would you consider yourself a moderate in that you work well with the Republicans and Democrats in the legislature?

A. Fairly well.

Q. And you have friends that you are able to put together legislation on both sides of the aisle, don't you?

A. Yes.

Q. Was that one of the reasons you chose to become a member of New South Coalition and pull away from ADC in the early '80's?

A. No, that didn't have anything to do with that.

Q. This is an independent area of the state, Tuscaloosa, from the ADC, isn't it?

A. Pretty much.

Q. It's a New South Coalition stronghold?

A. At the present time. But at one time we worked real closely with ADC. But it has changed some over the last three or four or five years.

Q. You know Lucius Black?

A. Yes.

Q. Now, Lucius Black ran as a . . . He is a black member of the legislature?

A. That's right.

[96] Q. And from what district, if you know? Do you know what it is under the 1983 plan?

A. If I could see the area I could tell.

Q. What city is it?

A. It's pretty much Utah, Sumter County area.

Q. Is that Greene, Sumter County?

A. Right.

Q. So, would that be old 1983 house district 67? This is the 1983 plan. Was he in this district?

A. Yes.

Q. And is he now . . . Is he part of the same nested senate seats you are in; senate district 24?

A. Yes.

Q. And that would be under the Reed-Buskey plan, house district 71. Is that correct?

A. That is right.

Q. And do you recall in 1982 when the Court ordered a special election to occur in 1983? Do you remember that period?

A. I remember.

Q. And do you remember Representative Black running as an independent and not as a Democrat or Republican and being elected to office as an independent; as a black person running for office as an independent?

A. Yes.

Q. And that was because the endorsements in Democratic party [97] had been controlled basically by the ADC in those areas. Is that right?

A. I don't know.

* * *

IN THE UNITED STATES DISTRICT COURT
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97-A-715-E
Montgomery,
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January 18-25, 2000

* * *

TESTIMONY ON JANUARY 20, 2000
OF WENDELL MITCHELL

DIRECT EXAMINATION

BY MR. PARK:

* * *

[645] Q. You mentioned that your current senate district 30 includes all of Autauga, part of Elmore, part of Lowndes, part of Butler . . . or all of Butler, all of Crenshaw, all of Pike and then part of Dale County. Is that right?

A. That's correct.

Q. Do you know how senate district 30 got configured?

A. I had no input, except one day in the hall . . . I mean, having heard all the testimony. This is the best I can share with you.

In the hall Joe Reed stopped me. He was not looking for me, I was not looking for him. But he stays up there a lot and we ran into each other. And he asked me if I had any preferences about my senate district. And I told him that I would like to have Autauga County in my district because they have been awfully good to me. I mean, you can understand that, having gotten votes I have gotten there all these years, that I am very fond of serving them and, apparently, they liked me. Now, that was a very short, stand-up conversation.

Two or three weeks later . . . Several days later. It have [sic] been weeks later, I ran into him again and he had a map that had Autauga County in the proposed district. And he asked me if I was satisfied with that and I told him I was. But both conversations . . . neither one was more than three minutes long. And that's the only input I had into that plan.

Q. Did the inclusion of Autauga County in senate district 30 have anything to do with race?

A. I don't know anything about that. I don't know anything about how this plan was drawn. I was not in on any of the preparation of the plan. I was interested in protecting my interests where I knew I could do the best politically.

* * *

IN THE SUPREME COURT OF ALABAMA

JOHN RICE and **CAMILLA L. RICE,**	)	
Appellants,	)	**Case No. 1970449**
v.	)	
DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN McKINNON, and **ANDREW HAYDEN,** on behalf of themselves and others similarly situated,	)	
and	)	
JIM BENNETT, in his official capacity as Secretary of State of Alabama,	)	
Appellees.	)	

ON APPEAL FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY CASE NO. CV-93-689-PR

BRIEF OF APPELLEE JAMES BENNETT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF ALABAMA

BILL PRYOR (PRYOO2)
ATTORNEY GENERAL
BY:

John J. Park, Jr. (PAR041)
Assistant Attorney General
Stanley E. Graham (GRA071)
Assistant Attorney General
Charles E. Grainger, Jr.
Assistant Attorney General

* * *

ARGUMENT

I.

THE TRIAL COURT'S JUDGMENT SHOULD BE VACATED AND THIS CASE DISMISSED AS MOOT.

In this appeal, the Rices challenge the lines of legislative districts that are up for election in 1998. The cycle for that election has been underway for some time, and the primary election is set for June 2, 1998. Moreover, candidate qualifying closes on April 3, 1998. This case cannot be decided in time for any changes to be implemented in time for the 1998 elections.

Moreover, the legislative districts throughout the state are due to be changed after the 2000 Census results are in. The 1998 elections are the last time these district lines will be used. Any discussion of the constitutionality of those lines, which cannot be changed in time for the 1998 election and will not be used again, is academic.

Thus, this appeal and the underlying case are moot. the issues are likewise not capable of repetition. In such a case, the Circuit Court's judgment should be vacated and the case dismissed. *See Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1071 (1997); *Gross v. QMS, Inc.*, 669 So. 2d 839, 840 (Ala. 1995); *Masonry Arts, Inc. v. Mobile County Commission*, 628 So. 2d 334 (Ala. 1993).

Accordingly, the Circuit Court's judgment should be vacated and the case dismissed as moot.

II. WHETHER THE CIRCUIT COURT PROPERLY DENIED THE RICES' CLAIMS OF UNCONSTITUTIONAL RACIAL GERRYMANDERING AND UNCONSTITUTIONAL VOTE DILUTION

The Rices contend that the Circuit Court erred when it held that the Reed-Buskey Plan did not violate their constitutional rights. In particular, the Rices contend that they are the victims of unconstitutional racial gerrymandering and vote dilution. Bennett disagrees with these contentions.

The Circuit Court properly denied the Rices' claims. First, the Rices are guilty of laches so the injunctive relief they sought is not appropriate. Second, their claims were properly denied on the merits.

A. The Rices Are Not Entitled to Relief Because They Are Guilty of Laches

Notwithstanding the Circuit Court's denial of Bennett's motions for judgment in his favor on this basis, the clock continues to tick. Cf. *Aldridge v. Valley Steel Constr., Inc.*, 603 So. 2d 981, 983-84 n. 1 (Ala. 1992) ("Valley may offer in support of its judgment any argument supported by the record, whether that argument was ignored by the circuit court or rejected.") It is now impossible for this Court to grant relief that can be effected in time for the 1998 elections. This Court should reverse the Circuit Court's judgment and remand this case to the Circuit

Court with instructions to dismiss the Rices' lawsuit and vacate its November 20, 1997 Order.

1. The McKee Ruling

Subsequent to the filing of the Rices' lawsuit, other parties challenged the Alabama Congressional redistricting plan in a case styled *McKee v. James, Civil* Action No. 97-C-2078-W, in the United States District Court for the Northern District of Alabama, Western Division. Pursuant to the Voting Rights Act, a three-judge court was convened. In *McKee*, Bennett and the other State Defendants raised the same laches argument that was raised in this case as one of their defenses. On March 23, 1998, at 1:47 p.m., the parties in *McKee* stipulated to the dismissal of the action agreeing, *inter alia*, that it was inherently impractical to try to modify the Congressional redistricting plan before the 2000 Census. *See* Attachment A. This Stipulation resolved the case.

Later the same afternoon, however, at 3:39 p.m., the three-judge court filed an Order in which it denied the McKee Plaintiffs' claims with respect to the 1998 elections on the ground that they were guilty of laches. *See* Attachment B. The court observed that the earliest date at which it could enter an injunction was early June. "That could cause enormous difficulty to the state in getting ballots printed and distributed and otherwise discharging its election duties." *Id.* at 6. For that reason and others, the court entered summary judgment in favor of Bennett and the other State Defendants with respect to the 1998 election.

This case is in the same posture. For the reasons set forth in section A.2 below, no relief is possible before the candidate qualifying deadline on April 3, 1998, and relief before the June 2 primary is unlikely. To implement relief in this case would require a remedy hearing and preclearance. The Department of Justice gives itself sixty (60) days to respond to a request for preclearance, and approval is not guaranteed. *See* 28 C.F.R. § 51.9. In sum, the federal court's ruling in *McKee*, albeit *dicta*, should be persuasive in this case.

2. The Rices' Claims Are Barred by Laches

The Rices stated that the genesis of their complaint in intervention is the Circuit Court's 1993 decision in *Sinkfield v. Camp*, and the resulting state legislative districting plan. They premised their claim that the existing legislative plan created by the *Sinkfield* decree is unconstitutional on United States Supreme Court decisions rendered subsequent to the Circuit Court's judgment. The holdings on which the Rices rely were, however, clearly prefigured in *Shaw v. Reno*, 113 S.Ct. 2816 (1993). Despite the fact that the *Sinkfield* and *Shaw v. Reno* decisions were issued in 1993, the Rices waited until August of 1997, four years later, to attempt to challenge the existing legislative district lines in this action. Quite simply, the Rices slept on their rights in the four years that passed since the *Sinkfield* and *Shaw* decisions and waited until just months before the 1998 legislative election cycle began to assert their claims. Their delay in challenging the existing plan is to the great detriment of Bennett and the voting public at large. Consequently, the Rices' claims are due to be

barred by the equitable doctrine of laches. The doctrine of laches is an equitable one that may be invoked to deny equitable relief "to one guilty of unconscionable delay in asserting a claim." *Stone v. Gulf American Fire & Casualty Co.*, 554 So. 2d 346, 362 (Ala. 1989). However,

> [l]aches cannot be founded simply on a lapse of time; to bar an action, laches requires either delay with notice of the existence of a right that results in a disadvantage to another, or delay which effects a change in circumstances such that the controversy can no longer be determined with reasonable accuracy.

Jones v. Braggs, 637 So. 2d 1356, 1359 (Ala. Civ. App. 1994), citing *Davis v. Thomaston*, 420 So. 2d 82 (Ala. 1982). Delay and prejudice work in a "complementary" fashion. *Marshall v. Meadows*, 921 F. Supp. 1490, 1494 (E.D. Va. 1996). Thus, a party asserting the defense of laches will be:

> "aided by the inference of prejudice warranted by the plaintiff's delay. The plaintiff is then to be heard to excuse his apparent laggardness and to prove facts manifesting an absence of actual prejudice." *Giddens [v. Isbrandtsen Co.*, 355 F. 2d 125 (4th Cir. 1966)] at 128. Clearly the greater the delay, the less prejudice required to show laches, and vice versa. But the defendant is ultimately required to prove prejudice (given the defendant's burden to plead and prove laches under Fed. R. Civ. P. 8(c)) and "may either rest on the inference alone or introduce additional evidence." *Id.*

White v. Daniel, 909 F.2d 99, 102 (4th Cir. 1990). Bennett did not rest on the inference of prejudice alone.

(A) The Rices' Delay Is Unexplained And Inexcusable

As noted above, the Rices waited for nearly four years and an election before bringing their federal and state court challenges to the redistricting plan. To the extent that the case law was not developed in 1993, it was certainly sufficiently well developed by June 1995 to support the Rices' claims. Nonetheless, they waited for two more years. Their delay is inexcusable.

More specifically,

- In *Shaw v. Reno*, 113 S.Ct. 2816 (1993), the United States Supreme Court held that a plaintiff may state a claim for relief under the Equal Protection Clause of the Fourteenth Amendment by alleging that a State "adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." *Id.*, at 2832.
- In *United States v. Hays*, 115 S.Ct. 2431 (1995). the United States Supreme Court held that a voter who did not live in an allegedly racially gerrymandered district lacked standing to pursue an attack on the gerrymandered district.
- In *Miller v. Johnson*, 115 S.Ct. 2475 (1995), the United States Supreme Court applied the principles articulated in *Shaw* to the Georgia congressional redistricting plan. The Court "ma[de it] clear that parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the geometry and makeup

nor required to make a threshold showing of bizarreness." *Id.* at 2488. Rather, the plaintiff "must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions, defined by actual shared interests, to racial considerations." *Id.*

- In *Shaw v. Hunt*, 116 S.Ct. 1894 (1996), the United States Supreme Court held that the North Carolina congressional redistricting plan violated the Equal Protection Clause. The Court applied its holding in *Miller* to the claims that had been found sufficient in *Shaw v. Reno*.

- *In Bush v. Vera*, 116 S.Ct. 1941 (1996), the United States Supreme Court affirmed a judgment holding the Texas congressional redistricting plan unconstitutional. A majority of the Court applied the strict scrutiny analysis articulated in *Miller*.

Without agreeing that these decisions entitle the Rices to relief, it is clear that they could have based their "bizarreness" claim on *Shaw v. Reno* in 1993. They could likewise have read the 1995 decision in *Miller v. Johnson* to determine what showing they needed to make to prevail. The 1995 decision in *Hays* told the Rices the permissible scope of their complaints, *i.e.*, they had standing to complain about the lines of the districts they live in and only those districts. The 1996 decisions, *Bush v. Vera* and *Shaw v. Hunt*, simply reflect the working-out of the principles articulated in *Shaw v. Reno* and *Miller v. Johnson*. Nothing required the Rices to wait until May 1997, on the brink of the 1998 election cycle.

Moreover, the delay is unexplained. The Rices offered no justification for having waited nearly a year after the most recent of the decisions they cited to file their federal lawsuit. *Bush v. Vera* and *Shaw v. Hunt* were decided on June 13, 1996, and the Rices' federal lawsuit was not filed until May 2, 1997. The case did not make it to state court until late August 1997. As noted above, the trend on which the Rices rely would have supported the theory of their complaint long before June 1996. Moreover, the Rices were not prepared to litigate a case of this nature: They had neither an expert nor a proposed plan.

Likewise, the Rices cannot identify a material change in circumstances or law which excuses their excessive delay in prosecuting their claims. Any claim of reliance on the legislature to address the problem lacks merit. The legislature's failure to act on reapportionment resulted in the state action in which Rices reluctantly intervened. Moreover, since *Shaw* was decided, the legislature has not introduced a single bill seeking legislative reapportionment which would cause the Rices to reasonably anticipate legislative reform. Nothing of the sort was pending in 1997 when they filed their federal lawsuit. They fail to point to any specific facts justifying any claim of reliance on the legislature.

Instead, waiting until the last days of the 1997 session of the Alabama legislature and the beginning of the 1998 election cycle to assert their claims, the Rices precluded legislative relief and prejudiced Bennett by forcing him to choose between a thorough and zealous defense and a rushed solution designed to re-stabilize the 1998 election cycle. That cycle has been underway since

June 2, 1997. Because the Rices were not vigilant in pursuing the opportunity presented to them since 1993, pressure was placed on the parties to litigate and the Circuit Court to decide complex legal, political, and demographic issues in order to bring certainty to the 1998 election process.

In *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990), the court validated the application of laches to election controversies in facts similar to these:

> Laches arises when an unwarranted delay in bringing a suit or otherwise pressing a claim produces prejudice to the defendant. *See Herman v. City of Chicago*, 870 F.2d 400, 401 (7th Cir. 1989). In the context of elections, this means that any claim against a state electoral procedure must be expressed expeditiously. *See, e.g. Williams v. Rhodes*, 393 U.S. 23, 34-35, 89 S.Ct. 5, 12-13, 21 L.Ed.2d 24 (1968). As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made.

The Rices failed to proceed expeditiously.

(B) The Rices' Delay Is Prejudicial

The failure of the Rices to bring their claim expeditiously operates to the substantial prejudice of Bennett and the tax-paying public. If the Circuit Court or this Court orders reapportionment, there will be insufficient time to implement those changes in time for the June 2, 1998 primary. (Shanholtzer Affid., p. 3) In the first place, if a court-ordered plan were warranted and adopted, such a plan would require preclearance from the Justice

Department pursuant to Section 5 of the Voting Rights Act. (Shanholtzer Affid., p. 5) Preclearance is a time consuming process. Additionally, assuming preclearance was obtained of the court's plan, the Office of the Secretary of State would likely be responsible for contacting the probate judges and county commissions of the counties affected. The county commissions would then have the obligation to change the assignment of voter precincts, and perhaps the number and location of precincts, in each county. Ala. Code § 17-5A-5 (1975); (Shanholtzer Affid., p. 4) Upon completion of this process, the county commissions would be required to obtain preclearance of such changes by the U.S. Justice Department pursuant to Section 5 of the Voting Rights Act. (Shanholtzer Affid., p. 5) Section 17-5A-5(d) of the Alabama Code mandates that this process be complete at least three months before the election (in this case, by March 2, 1998). It is simply too late to do all that now.

In order to give the Justice Department sixty (60) days to preclear changes to the legislative districts in time for the 1998 elections, county commissions would have had to make the proposed changes, adopt a resolution containing the changes, prepare a preclearance packet for the Justice Department and cause that packet to be received by the U.S. Justice Department by December 31, 1997 (January 1st being a state and federal holiday). *See* Ala. Code § 17-5A-7 (1975). If the Justice Department acted within the 60 days allotted, this preclearance would have been obtained on the last day possible consistent with § 17-5A-5(d), Code. That is no longer possible.

If a violation were found and the Circuit Court found it necessary or appropriate to split existing precincts in

order to provide a remedy, the burden on county governments would have increased significantly. Without the benefit of a specific proposed solution from the Rices, in the form of a proposed plan or expert testimony, it was and is speculative, if not impossible, to gauge the full extent of the problem. The Rices have still not proposed any specific remedy for the alleged constitutional infirmity. At a minimum, splitting precincts would add the burden of reassigning voters to the new precincts. (Shanholtzer Affid., p. 4) This would significantly disrupt the State's current program to reduce voter fraud by removing the names of dead and relocated voters from the voters lists. *See* Ala. Code §§ 17-4-200 to-204 (1975). Additionally, if the splitting of precincts were to result in an excess of 600 registered voters in a single precinct for counties using voting machines, additional precincts and locations would have had to be established within the plans adopted by county commissions, resulting in substantial voter confusion. Ala. Code § 17-5A-4 (1975).

Another time factor in this action extends from the necessity of raising money to run effectively for public office. Given that candidates have been entitled to raise money since June 1997. members of the voting public have obviously already relied on existing district lines in making decisions whether to contribute to particular candidates. A change in district boundaries would have a direct effect on their interests in contributing to particular candidates for specific races. If district lines were ultimately redrafted, a contribution intended for a voter's particular district or district candidate could benefit a

new district of which the contributor may not be a registered voter, contrary to that voter's intent when making the contribution.

It is a common misconception that candidacy is established by qualifying as a candidate with a political party. In fact, the Fair Campaign Practices Act and the Alabama Ethics Act provide for candidacy to be established up to one year before the election. The Fair Campaign Practices Act has established a one year time frame in which candidates may raise money and therefore meet the thresholds for qualifying as candidates. Ala. Code § 17-22A-7 (1975) (effective October 1, 1997); and Ala. Code § 36-25-6 (1975) (effective through October 1, 1997). The Fair Campaign Practices Act and the Alabama Ethics Act establish monetary thresholds which, once raised by a candidate, establishes his or her candidacy pursuant to Alabama law. Ala. Code §§ 17-22A-2(1) and 36-25-1(3) (1975). Because the next primary election is to be held on June 2, 1998, candidates have already begun qualifying for election to the existing legislative districts. Each of the districts in Lee County, as well as adjoining districts, stands to be significantly impacted by the Rices' suit.

Additional examples of prejudice to the voting public likely to be caused by the Rices' excessive delay in asserting their claims included the possibilities that:

- Incumbents from two separate districts could have been moved to the same district and forced to run against one another.
- A citizen voter could have contributed to a candidate in his district, only to find himself reassigned to a different district altogether where the candidate is not running for office.

- A candidate could choose to run in his district, solicit contributions and expend resources, and then be moved to another district in which he might be unelectable due to the incumbency of another candidate or the demographics of the voters in the new district.

Clearly, the tardiness of this litigation injects considerable confusion and disruption into a process already under way, to the disadvantage of the contributing public and candidates. The Rices asked the Circuit Court and now ask this Court to make a mid-stream change to the election process in a narrow time frame caused by their slackness in the filing of this action. As the District Court explained in *Marshall*:

> Were this Court to strike the statute, permit the legislature to rework it, and have the Justice Department review it per the Voting Rights Act, various parties including Warner and his supporters would be forced into a frenzy of activity. That frenzy would have been avoided had plaintiffs filed suit when they first considered it. . . .

Id., 921 F. Supp. at 1494.

* * *

IN THE SUPREME COURT OF THE STATE OF ALABAMA
APPEAL NO. 1970449

JOHN RICE and CAMILLA L. RICE,

APPELLANTS

v.

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON AND ANDREW HAYDEN on behalf of themselves and others similarly situated,

AND

JIM BENNETT, in his official capacity as Secretary of State of Alabama.

APPELLEES,

ON APPEAL FROM THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA
CASE NO. CV-93-689-PR

REPLY BRIEF OF APPELLANTS JOHN RICE AND CAMILLA L. RICE

ORAL ARGUMENT REQUESTED

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* * *

of higher jurisdiction. The Rices have presented to this Court valid arguments that the current legislative districting scheme contains serious constitutional violations: it is ludicrous for the State appellees to suggest that this Court dismiss the appeal.

II. The State Appellees' Request That This Court Dismiss The Challenge To The Legislative Districts In Question As Being Moot Should Be Denied.

This issue is not moot as the State Appellees now suggest. First, the reasons relied upon by the State Appellees in their argument that this issue is now moot could have been presented by the State months ago, but were not. Nothing has changed but the passage of several months – a fact from which this issue is not rendered moot. Second, it cannot be said with any amount of certainty that there will not be any more elections held under the current districting scheme after the 1998 elections. The reason why the state appellees' argument must fail is that there is no guarantee that the legislature will properly redistrict itself after the 2000 census; thus, there is the possibility that the 2002 legislative elections will need to be conducted based on the districts at the time – districts put into place by the Reed-Buskey Plan. Further, at any time between now and the time when the results from the next decennial census are made available to the state for redistricting purposes, a special election may be required in any House or Senate district. As unfortunate as it is to discuss, the death of a legislator requires that a special election be held in the district represented by that

deceased legislator. It would be premature for this Court to accept the State Appellees' argument that this issue is now moot. The death of a legislator has already occurred once during the pendency of these proceedings when the late Thomas Reed passed away. It would be unreasonable to suggest that there is not a possibility that this scenario will present itself again in the future. Therefore, this issue is not moot as an election may be required in any one of the unconstitutional districts before the next redistricting plan is implemented.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ANDREW D. THOMPSON, et al.,
Plaintiffs,

vs. CIVIL ACTION NO.
97-A-715-E

HAL SMITH, et al.,
Defendants.

* * * * * * * * * * * * * *

DEPOSITION OF PEGGY C. KELLY taken pursuant to stipulation and agreement before Patricia Starkie, Registered Professional Reporter, CM, and Commissioner for the State of Alabama at Large, at the offices of the Attorney General, Alabama State House, 11 South Union Street, Montgomery, Alabama, on Thursday, September 23, 1999, commencing at approximately 9:45 a.m.

* * * * * * * * * * * * * *
* * *

[15] Q. Do you have any evidence that you were placed in Senate District 30 because of your race?

A. I feel that, but I have no evidence.

Q. Why do you feel that?

A. Because we're separated from everybody else. Our representative is in south Alabama.

Q. Do you have a problem with Senator Mitchell's representation of Autauga County?

A. I have no problem whatsoever with Senator Mitchell's representation, but I feel like that we need one of our own closer to us.

* * *

[42] Q. Can you tell us, exactly what do you claim is wrong with your house district?

A. There is nothing wrong with the house district.

Q. Satisfied with the house district?

A. Yes, I am.

* * *

[44] Q. And you are satisfied with 88?

A. Yes.

Q. And you're not asking – And I'm not trying to put words in your mouth. I just want to know.

A. No, I'm satisfied with 88.

Q. And you're not asking the Court to do anything with respect to 88?

A. Right.

* * *

[48] Q. All right. Other than distance and other than the little neck that put them together, do you have any other complaints about how your senatorial district is drawn?

A. No.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ANDREW D. THOMPSON, et al.,

Plaintiffs,

vs. CIVIL ACTION NO.
97-A-715-E

HAL SMITH, et al.,

Defendants.

* * * * * * * * * * * * * *

DEPOSITION OF BIBB GUNTER taken pursuant to stipulation and agreement before Patricia Starkie, Registered Professional Reporter, CM, and Commissioner for the State of Alabama at Large, at the offices of the Attorney General, Alabama State House, 11 South Union Street, Montgomery, Alabama, on Friday, September 24, 1999, commencing at approximately 3:15 p.m.

* * * * * * * * * * * * * *
* * *

[22] Q. Do you contend that you were placed in House 86 because you're white?

A. I was already in 86 in some form or fashion before that was drawn up.

Q. Okay. Do you contend that you were in Senate 29 because – placed in Senate 29 because you're white?

A. I don't think so.

* * *

[28] Q. You can answer. Do you think it's okay to use the line between Henry and Houston counties as a line?

A. I think the south side of 86 is okay. When you get up into the Henry County, then you start getting, you know, pretty hairy up in here.

Q. And you're talking about what's marked as 85, right?

A. That's correct. That's what I said, the south side of 86 is okay. But when you start getting up in here in the part that you said was the borderline, getting up into Henry County, which includes Headland and Abbeville, in that area, it starts going like this (indicating).

* * *

[31] Q. Do you have any evidence or any understanding why it was done like that?

A. No, I don't. That's why I'm here today and that's why I've been asking the question, like I told you while ago, why is it drawn like that? Why would you draw a line like that, especially right in here? Why would you come in and do that? Most of the time when things of this nature are done on different projects, you use main arteries, like I said while ago, like the main arteries that come through districts. Why were these drawn like this?

* * *

[36] Q. Is that why you filed this lawsuit, is to get clarity?

A. Damn right. I want to know what the hell is going on. You got all this rigmarole here, and all of a sudden you drop way down here [37] in the city of Dothan and cut out a portion of a place as big as the city of Dothan, with 65,000 people, and you cut out this little piece of pie? That don't make sense.

* * *

[50] Q. So you would be in either 86 or 87 if the Court redrew the house districts, you think?

A. Yes. Have to be.

Q. Okay. You wouldn't be over in 85, would you?

A. No. I'd be in 86 or 87.

* * *

[55] Q. (Mr. Park continuing) Let me go back to Exhibit 13. Other than the inclusion of House District 85 in Senate District 29 –

Because you included 85, 86, and 87 in [56] 29, right?

A. That's correct.

Q. Other than including that, do you have any problems with Senate 29?

A. Other than including those three in that one – those three houses –

Q. Other than 85 – other than what – Let me rephrase my question.

Do you see any problems, other than any line that's attributable to House 85, with Senate 29?

A. Let me make sure.

MS. BROWN: I'm going to object to the form. You can answer.

A. I don't understand, really, the question. The lines the way they are now, do I object to anything other than that?

Q. Other than – the lines as they are now, the lines that –

And when you say that, you're pointing to the lines of House 85, right?

A. That's what you asked me.

Q. Okay. Other than those lines, do you have any objection to Senate 29?

A. I wouldn't have any objection. I mean, I'm here to object only to those lines.

Q. Okay. And, again, those are the lines of House 85 that go into Senate 29; is that right?

A. That's right. Which consist of 85, 86, and 87.

Q. Okay. And is it your contention that those lines of House 85 were drawn for racial reasons?

A. Yes.

* * *

[78] Q. Well, you know your representative, Joe Carothers, you've already said.

A. Yes, sir.

Q. Did you support him when he ran?

A. I voted for Joe, yes, sir.

Q. And so the candidate of your choice won out of your district?

A. Yes, sir.

Q. And what about this senator? Over the [79] years, Chip Bailey used to represent you, I believe; that is, in the – it would have been in the '94 election he won. Did you support him –

A. I voted – I did, I voted for Chip.

Q. And you were pleased he had won?

A. Yes, sir.

Q. And most recently, he was – I don't remember – I don't know the local politics. He was defeated by –

A. Harri Anne Smith.

Q. – Harri Anne Smith?

A. I voted for Harri Anne Smith.

Q. So your candidate won again?

A. That's right.

Q. So at least where you are voting, you have been able to elect candidates of your choice?

A. That's correct.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ANDREW D. THOMPSON, et al.,

Plaintiffs,

vs. CIVIL ACTION NO. 97-A-715-E

HAL SMITH, et al.,

Defendants.

* * * * * * * * * * * * * *

DEPOSITION OF KAREN OUTLAW taken pursuant to stipulation and agreement before Patricia Starkie, Registered Professional Reporter, CM, and Commissioner for the State of Alabama at Large, at the offices of the Attorney General, Alabama State House, 11 South Union Street, Montgomery, Alabama, on Wednesday, December 1, 1999, commencing at approximately 12:30 p.m.

* * * * * * * * * * * * * *

* * *

[18] Q. Okay. Do you know why Autauga County was linked to Pike and Crenshaw counties in the senate plan?

A. Well, I have my own assumptions.

Q. And what's your assumption?

A. From what I understand, that I think you needed a block of whites to put in with here. I believe it was – Joe Reed was one of the ones that helped work this out, and – I mean, there is no reason for Autauga County to be

involved with these [19] counties whatsoever. The only thing I can see is that maybe they wanted to grab a few more of the white race to put in with these to create a black district.

Q. And where was that black district it was creating?

A. Here in the District 23.

Q. And was Dr. Reed out to create a black district, majority black district, or out to create a majority white district in your opinion?

A. For what district? For District 30?

Q. What was he trying to do first?

MR. MONTIEL: I'm going to object to the form, but you can answer when I make those objections.

A. Okay. Well, they both go hand and hand. If he's looking for a majority black district, he has to take something away to add to a white district.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ANDREW D. THOMPSON, et al.,

Plaintiffs,

vs.

HAL SMITH, et al.,

Defendants.

CIVIL ACTION
NO. 97-A-715-E

* * * * * * * * * * * * * *

DEPOSITION OF WILLIAM RICARDO MONTIEL, M.D. taken pursuant to stipulation and agreement before Patricia Starkie, Registered Professional Reporter, CM, and Commissioner for the State of Alabama at Large, in Room 173, The University of Alabama School of Law, 101 Paul Bryant Drive East, Tuscaloosa, Alabama, on Thursday, December 2, 1999, commencing at approximately 3:20 p.m.

* * * * * * * * * * * * * *

* * *

[7] Q. And who is your representative for 63?

A. You know, I don't pay attention to the representatives that much. I'm not sure. I [8] can't remember. I usually vote straight Republican ticket.

Q. Do you know whether he's doing a good job, bad job, indifferent job?

A. Not really.

Q. You don't have any complaints about his performance, do you?

A. Not that I know of.

* * *

[11] Q. Can you tell me what you mean by racially gerrymandered?

A. Well, my opinion about it is that it just appears that where I live and my district, the way it's drawn up, it just has an unusual look to it in my opinion. I mean, it doesn't include all of the city of Tuscaloosa. I think that's my primary complaint.

* * *

[22] Do you think that you've been put in your district because you're white?

A. I don't know why that district is the way – I saw a recent map. I'm not sure why it would be drawn that way. I don't know why I'm in that district.

Q. Okay. So you can't say you were put in it because you were white?

A. No, I can't say that.

Q. Okay. And do you know whether House District 62 is majority white or black?

A. I do not know.

Q. Do you know whether House District 70 is majority white or black?

A. I don't look at people that way. I don't know.

* * *

[30] Q. Okay. Do you think that house district – this portion of Hale County was placed in your senate district because of the race of the people there?

A. I wouldn't know why they would draw it that way.

Q. You can't say it was or wasn't?

A. I can't say it was or wasn't for that reason.

* * *

[32] Q. Do you have any knowledge about how those districts were drawn?

A. No, I couldn't specifically say how they were drawn.

Q. Do you have any evidence that race was a consideration in the drawing of them?

A. No, and that's not even a concern of mine.

* * *

[41] Dr. Montiel, have you read the complaint that's been filed in this action in your behalf?

A. No, I have not.

Q. Do you know whether or not you have alleged that the districts, the house and senate districts that you reside in violate the Constitution of the United States?

A. I don't know the specific legal aspect of it, no. My concern is the shape more than anything else.

* * *

[43] Q. And what is the evidence that has come to your attention that you believe makes your district a racial gerrymander?

A. I haven't seen the evidence. Primarily, my concern is the shape of the district in relation to where I live. I mean, there are people that aren't even – that are around the corner, around Central High School from me, and I'm not but a couple of blocks away, that aren't even in my district that would have something in common with me, I would think, whether they be black or white or anything else. I don't – I don't understand why it's written the way it's written. It should include Tuscaloosa.

* * *

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The Equal Protection Clause of the Fourteenth Amendment:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall the State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

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(4) (4)

Nos. 00-132 and 00-133

Supreme Court, U.S.
FILED
SEP 25 2000

In the

Supreme Court of the United States

DARRYL SINKFIELD, *et al.*
and
JAMES BENNETT, in his official capacity as
Secretary of State of Alabama, *et al.*,

Appellants,

v.

PEGGY KELLEY, *et al.*,

Appellees.

On Appeal From the United States District Court
For the Middle District of Alabama

MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO AFFIRM

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81pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Where the district court enjoined the future use of several state legislative districts, each of which was challenged by a resident plaintiff as a racial gerrymander, was the rule of *U.S. v. Hays* violated?

2. Did the district court correctly apply this Court's decisions in *Shaw v. Reno* and *Miller v. Johnson* to find that seven Alabama State House and Senate Districts were unconstitutional racial gerrymanders?

3. Did the district court properly conclude that neither laches, mootness, preclusion arising from state court proceedings, nor imminence of the census barred relief?

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MOTION

Pursuant to Rule 18.6, Appellees respectfully move the Court to affirm the judgment below, which enjoins James Bennett, Secretary of State of Alabama, from conducting further elections using the present Alabama State House Districts 63, 75, and 86 and State Senate Districts 21, 25, 29, and 30, and which declares these seven districts to violate the Equal Protection Clause. The majority of the panel thus found each of these districts to be unconstitutionally race-based, and not narrowly tailored to further any compelling governmental interest. The well-reasoned majority opinion below is supported by the record, consistent with recent jurisprudence enforcing the Equal Protection Clause of the Fourteenth Amendment, and warrants summary affirmance under *Shaw v. Reno*, 509 U.S. 603 (1993)("*Shaw I*"), *Miller v. Johnson*, 515 U.S. 900 (1995), *Bush v. Vera*, 517 U.S. 952 (1996) and *Shaw v. Hunt*, 517 U.S. 899 (1996) ("*Shaw II*").

STATEMENT OF THE CASE

The Kelley Plaintiffs do not find it necessary to undertake a description of the procedural development of the case in a way that differs from the description provided by the Appellants, except as may be reflected in the Argument.

STATEMENT OF FACTS

The Kelley Plaintiffs urge the Court to consider the following facts in addition to those presented by the Appellants, especially to appreciate the procedural defenses that assert no standing to challenge the district in which each plaintiff resides, and the defense that a new districting plan is imminent.

"The Alabama Legislature has a history of being unable to reapportion itself as required by the Alabama Constitution, without court intervention." Appendix to Jurisdictional Statements ("App.") at 161a. The period after the 1990 census was no exception. The districts under review were placed into effect pursuant to a state court consent decree between Sinkfield and the predecessor to Bennett. App. 126a-131a. None of the Kelley Plaintiffs are parties to that decree, and no other resident of those districts is a party to the decree. The only parties were the Sinkfield class and Bennett's predecessor; and Sinkfield was "certified to represent a class of all African-American citizens of Alabama . . . . ." App. 127a.

An initial review of the districts at issue in the proceedings below demonstrates some of the problems with Alabama's state legislative plan. The trial court described one of the districts as a "squashed butterfly," another as composed of "bizarre" "jagged fragments," another as two lobes connected by "a 25-mile-long land bridge," and yet another as two lobes connected by a three-mile-wide strip of uninhabited river bottom. In each district, census blocks are allocated along boundaries with adjacent districts to establish crisp patterns of racial division. As further review shows, these features are the direct result of a clear objective by the architect of the plan, who had unabashed racial intentions.

Each of the following senate districts, where at least one plaintiff resided, was found to be racially gerrymandered.

Senate District 21. This district is largely in Tuscaloosa County, where the main University of Alabama campus is located. A quick view of the map of SD 21, compared with previous districts in the county, shows that the southern portion of the county is no longer together in one district. App. 17b. A highly irregular swath of southern Tuscaloosa County has been excised, and included in SD 24 to the south. In its place, a large section of majority white Pickens County to the west has been included, and the overall effect graphically is to give SD 21 the look of a "squashed butterfly." App. 32a. The

district court reports that the portion excised-- between the wings of the butterfly-- is 64% black, whereas the Tuscaloosa County portion of SD 21 is 86% white. App. 31a and 32b.

The trial court also undertook a census block review of the boundary between the excised portion of southern Tuscaloosa County included in SD 24 and SD 21. App. 30a-31a. This review shows that majority white census blocks along the boundary are included in SD 21, while majority black census blocks are included in SD 24, *Id.*, and it is this segregation of the census blocks which gives SD21 much of the center of its "squashed butterfly" appearance.

Senate District 25. This Montgomery area district is one of two senate districts in Montgomery County, the other being SD 26. The net effect of the 1993 plan was to make the two senate districts located in Montgomery County more sharply segregated in racial terms. App. 33a.

As presently configured, SD 25 is actually composed of two lobes. App. 18b. One lobe in Montgomery County is joined with another lobe in Elmore County to the north by a bridgeless, three-mile-wide strip consisting of uninhabited river bottom and the city dump. App. 33a. The "eastern boundary runs neatly between the edge of majority-white suburbia and the mostly black rural areas." App. 35a. The western boundary of SD 25 divides the "the whiter east half of Montgomery from the blacker west half." App. 35a. There is said to be a turn eastward "to exclude from SD 25 the black neighborhoods of Montgomery's northeast side" and a "large detour" to leave a military installation out of SD 25. App. 35a. There was no evidence that this construction occurred at the request of the SD 25 incumbent. App. 35a.

The plan split ten precincts in Montgomery County alone. App. 1b and App. 7b. Notable is the split of the neighborhood at North Montgomery Community Center, where 85.2% of those placed inside SD 25 are white, and only 11.1% placed outside in SD 26 are white. Similarly, of those who vote at

Normandale Library, 84.8% assigned to SD 25 are white; but only 32.5% of those placed in SD 26 are white. App. 13b-14b.

Senate District 29. Senate District 29 is located in the southeastern corner of Alabama, with a large portion of its border directly adjacent to Georgia and Florida. This area is known as the Wiregrass region. The most notable features of SD 29 are its "jagged fragments" extending north and west in two counties, all located within the nested HD 85. App. 40a. The northwestern boundary of SD 29 is utterly "bizarre." App. 42a.[1]

The portion of SD 29 reflecting its "jagged fragments" was formed in part by stringing "together majority-black census blocks with connecting strips," and bypassing significantly less black census blocks which are much less distant from the core area of SD 29. App at 40a.

Senate District 30. This district is located to the west of Montgomery and runs mostly north to south. It could be described as two-lobed, with one lobe north of Montgomery County, and the second lobe south of Montgomery County. App. at 36a. Its most distinctive feature, "a 25-mile-long land bridge . . . that hugs the Montgomery County line . . ..", joins the two lobes. App. 36a. At several points, the bridge is less than one mile wide, and the "bridge" does not even contain a road connecting the north and south lobes. App. 36a-37a. A map of SD 30 is found at App. 20b. Understandably, the map depiction was labeled "bizarre" by the trial court.

The racial purposes of this land bridge are apparent when the racial make-up of the surrounding areas is considered. The

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[1]The Appellants omitted the map of SD 29 from App. 1a, the April 24, 2000 Memorandum Opinion of the three-judge court. The map of SD 29 is included in the by Appellees at App. 19b.

land bridge hugging Montgomery County runs through the neighboring county to the west, Lowndes County, by including only census blocks that are overwhelmingly white. "The SD 30 part of Lowndes County is 79% white; the rest of Lowndes County is 80% black." App. 38a. At the southern end of the Lowndes County land bridge, a municipality is split, to include in SD 30 a portion of the city which is 90% white, and to leave out a portion of the city which is 86% black. App. 38a.

As noted, the bridge joins a southern lobe and a northern lobe. The southern lobe is comprised of three counties and a portion of a fourth county, and the northern lobe is 79% white Autauga County. The overall population of SD 30 is 72% white.

The trial court noted how the inferences arising from the configuration and racial composition of these districts were explained in part by Reed's objectives in maximizing *black* representation. *See* App. 28a (SD 21); App. 34a (SD 25); App. 36a-37a (SD 30); App. 39a-41a (SD 29).

House Districts — The trial court also found that three districts of the Alabama House of Representatives were reflective of predominantly racial motives in derogation of traditional districting principles. Each of these districts is "nested" in a separate one of the senate districts discussed above, and also found to be a racial gerrymander. The particular districts are HD 63, HD 75, and HD 86. The house districts are discussed by the trial court in the section of the Memorandum Opinion in which the house district's corresponding senate district is discussed. *See* App. 27a- 33a (HD 63); 33a-36a (HD 75); App. 39a-43a (HD 86). Maps of HD 63, HD 75, and HD 86 are found at App. 21b, 22b, and 23b, respectively.

The Architect– The trial court found that much of this district handiwork was driven by racial objectives focused in a larger way on increasing the number of black elected officials. The state itself confirmed this in 1993, after the state trial court entered its partial consent judgment adopting the Reed-Buskey

plan, and the state urged preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c by emphasizing "the Plan's deliberate creation of enough majority-black districts to assure nearly proportional representation in the legislature." App. 20a n.14.

The State's perspective accurately reflected the purposes of the plan's architect, Dr. Joe Reed. He was dissatisfied with the previous plan of reapportionment "insofar as it did not achieve proportional black representation . . ." App. 20a. In his drafting, Reed "set out to maximize the number of black representatives and senators elected to the legislature by maximizing the number of black-majority districts." App. 21a.

Reed also testified as to the process by which he constructed the districts. While racial data after the 1980 census had only been available for individual blocks in the cities (Tr. at 29), after 1990, the redistricting computers of Alabama contained racial data for every individual census block in the state. Tr. at 40. For divided counties, districts were drawn using block level data; for it was "necessary" that "if you divided the county in some fashion you did it on a census block level." *Id.* Dr. Reed agreed that "when you worked on the computers you had the information before you at all times as you are drawing the district lines as to the race of the population." Tr. at 53. For many of the districts, "as you were drawing the districts you had the race of the population depicted so that you could be aware of that information when you drew the district lines." Tr. at 57. App. 30b.

Nowhere in the facts recited by either the State of Alabama or the Sinkfield Appellants is there any mention of the extensive evidence of split communities and precincts. Just for the seven invalidated districts, 29 precincts were split to form the three house districts, and 56 were split to form the four senate districts. App. 1b-16b. A score of cities and towns were split, including localities as small as Abbeville, Daleville, Fort Deposit, Headland, Kinsey, Millbrook, Moundville, Newton, and Taylor, all with fewer than 10,000 persons. App. 36b -

39b. Such splits are not required by the population requirements of Alabama districts, whose house districts average 38,000 in size and whose senate districts are 115,000 on average.

The Districts Found Not Racially Gerrymandered— The trial court found a number of districts challenged not to be predominantly race-based. SD 34 in the Mobile area was found to be a result of some racial population alterations from its previous composition; but the effects were said to be not significant enough to warrant strict scrutiny. App. 45a. Similarly, the evidence with respect to HD 89, which was adjacent to the "jagged fragments" of SD 29 in the southeastern part of the state, was found insufficient to warrant strict scrutiny. App. 42a-43a.

Prior to trial, the district court entered judgment against the plaintiffs on their challenges to three house districts: HD 88, HD 82, and HD 73. *See* App. 224a; App. 232a; App. 242a. Each house district is located in the central portion of the state in or near Montgomery County, and was said to be only a product of a general racial strategy, rather than reflective of moving specific census blocks because of their racial composition.

ARGUMENT

The trial court correctly applied now-settled precedents to find that each of the individual plaintiffs had standing to challenge four state senate districts, as well as three state house districts. The court correctly dismissed alternate political explanations and, after evaluating a mass of evidence at trial and from depositions and exhibits, determined that each invalidated district reflected the assignment of a significant number of persons on the basis of race and substantially subordinated traditional race-neutral principles. App.1a -54a.

The Court further was correct that neither the proper application of the doctrine of mootness, the equitable defense

of laches, nor the nature of available relief prevented consideration of the merits of each plaintiff's claim.

I. The District Court Properly Applied *United States v. Hays*, 515 U.S. 737 (1995) and Determined That Each Plaintiff Had Standing To Challenge The District In Which He Resided. *(Responding to Bennett Question 1 and Sinkfield Question 1).*

This case reflects a straightforward application of the rule of standing to assert claims grounded in *Shaw v. Reno*, 509 U.S. 603 (1993)("Shaw I"), and its progeny. The district court correctly determined that *Hays* provides that a *Shaw* plaintiff satisfies "the first element of Article III standing, injury-in-fact, by showing (1) that he lives in the district he challenges and (2) that the district is 'racially gerrymandered.'" App. at 5a-7a (citing *Bush v. Vera*, 517 U.S. 952, 957-58 (1996) or *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) ("*Shaw II*")). The district court duly noted this Court's treatment of the subject of standing in these cases, particularly that there had been no suggestion that residence in a gerrymandered district was insufficient. The district court also rejected the proposal from the Appellants that the "harm be subjectively felt by the plaintiff." App. 7a.

There is no dispute that at least one of the plaintiffs resides in each district found unconstitutional by the trial court.[2] The court below correctly determined the claims of the lawsuit to be seven different individual districts, each of different demographic composition, in four different regions of the state; but similar in that each district reflects the establishment of boundary lines by the systematic division of census blocks

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[2]Ricardo Montiel lives in SD 21 and HD 63, Genae Spinks lives in SD 25 and HD 75, Daniel Brown lives in SD 25, Bibb Gunter lives in SD 29 and HD 86, and Peggy C. Kelley and Karen D. Outlaw live in SD 30. Karen D. Outlaw also lives in HD 89.

according to their racial composition and resulting separation of small towns, neighborhoods, and voting precincts in the same way. App. 32b-39b.

Appellants essentially disagree with the determination by the trial court that each plaintiff challenged his own district. However, the trial court determined correctly that the "primary focus" of the complaint of each plaintiff was that a significant number of persons were placed into or outside of the very district in which each resides, App. at 3a-4a, and that this was done in a manner which offended and subordinated traditional districting principles. This "primary focus" of the claim is evident from the complaint itself. *See* App. 146a -149a.

Bennett is incorrect in his assertion that the plaintiffs complain in the same way as the *Hays* plaintiffs, i.e., merely that their districts would have looked different if adjacent black-majority districts were drawn differently. Jurisdictional Statement (of James Bennett) ("Bennett") at 13. Similarly, despite Bennett's suggestion, there has been no adjudication about "the neighboring black-majority districts." *Id.* at 17. The district court's injunction operates against the districts in which the plaintiffs reside, and against no other districts. There is no injunction against any of the districts that are majority black, as no plaintiff resides in any such district.

This "primary focus" is corroborated from the evidence offered at trial that traditional principles were sacrificed in the formation of each individual district in which each plaintiff resides. In at least one respect, Bennett accepts that Plaintiff Gunter resides within the very senate district that contains the primary focus of his complaint and evidence. Bennett at 13 n.4.

Appellants cite no case where a district resident was found to lack standing to raise a *Shaw* claim against his own district; and Appellees are unaware of any. To the contrary, the district court adopted a straightforward reading of *Hays* found by other courts. *See, e.g., Dillard v. Baldwin County Commission*, 2000 WL 1275696, at *8 (11th Cir. Sept. 8, 2000)("*Hays* sets forth a bright-line rule for a particular class of cases alleging illegal

racial gerrymandering with respect to voting districts: if the plaintiff lives in the racially gerrymandered district, she has standing . . .").

The teachings of *Shaw* and *Miller* are not limited to districts of a particular racial composition. While the proof required by *Miller* may be aided by evidence of a racial plan, goal, or target, the fact that that the district court invalidated districts which overall are majority white is not somehow improper. Similarly, this invalidation is not even "unique." App at 5a.

Federal courts have applied the *Shaw* doctrine to invalidate majority white districts in other instances. *See, e.g., Hunt v. Cromartie*, No. 4:96-CV-104-BO(3)(E.D. N.C. March 7, 2000, *prob. juris. noted* June 26, 2000, 99-1864 and 99-1865); *Smith v. Beasley*, 946 F. Supp. 1174, 1176, 1202-03 (D.S.C. 1996)(3-judge court); *Johnson v. Miller*, 929 F. Supp 1529, 1550, 1542 n.31 (S.D. Ga. 1996)(3-judge court). *Shaw* does not condition judicial intervention on an assessment of the race or political power of the particular plaintiff. *Shaw I*, 509 U.S. at 641.

Appellants seem to urge that, in addition to establishing residence in a racially gerrymandered district, each plaintiff must also demonstrate that he lives in a particular part of the district which was split racially, dislikes his representative, believes that the representative acts only on behalf of one race of constituents, or feels racially stigmatized. Jurisdictional Statement of Darryl Sinkfield, et al. ("Sinkfield") at 22-24; Tr. at 1449, 1453, and 1459. None of these extra requirements is supported by this Court's application of the standing rule of *Hays* in *Bush* or *Shaw II*. When considered more deeply, Appellants propose that every *Shaw* claim begin with a separate trial over what districts are really "the focus" of the case, notwithstanding the terms of the Complaint.[3] This

[3] Arguably, certain plaintiffs residing near the borders of majority-black districts illustrated a personal exclusion from the adjacent district by race. E.g., Tr. at 488. The plaintiffs were understandably offended by the structure of their own districts, and only concerned about their several neighbors to the degree each divided communities and neighborhoods along

approach would inject confusion and uncertainty into the standing analysis, and likely expend substantial judicial resources investigating individual districts other than those challenged in the pleadings. Given the level of consideration afforded this idea in the lower courts generally, review in this Court is premature.

In summary, each resident plaintiff has standing to challenge his own district as a racial classification violative of the Equal Protection Clause.[4] With the "benefit of *Hays*'s district-limited standing rule" the plaintiffs made clear repeatedly that they challenged the districts in which they resided. App. at 3a; Tr. at 1428.

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a boundary shared with the district in which a plaintiff resided. *See, e.g.*, Tr. at 619-20. If a future designer can draw the adjacent districts to achieve similar goals without fracturing small communities or neighborhoods, picking apart voting precincts block by block on the basis of race, or otherwise substantially disregarding traditional districting principles, then such districts may survive any *Shaw* challenge.

[4] Bennett also wrongly attacks the order of discussion by the district court in determining that the Plaintiffs possessed the standing to obtain a judgment in their favor. *See* Bennett at 17-18. First, the court appears unanimous in this approach. App. at 76a n.7. Second, Sinkfield also agreed with the approach. Tr. at 1481. Third, rather than invoke the concept of "hypothetical jurisdiction" rejected in *Steel Co. v. Citizens for A Better Environment*, 523 U.S. 83 (1998), as claimed by the Bennett, the district court proceeded to undertake the kind of careful and complete consideration of the injury suffered by the Plaintiffs. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In the *Steel Co.* case, the district court ruled against the plaintiffs on the merits, without finding that there was standing. In this case, the district court undertook a careful review of the facts which were found to constitute the required injury, and also constitute a portion of the merits. The case at bar does not reflect an invocation of "hypothetical jurisdiction."

II. The Trial Court Correctly Found Seven Districts To Be Unconstitutional Racial Gerrymanders.

A. The Trial Court's Findings Of Race-Based Districting Are Supported By Substantial Evidence. *(Responding to Bennett Question 5 and Sinkfield Question 5)*

Each of the Appellants lists a fifth question presented which calls into question the findings of the trial court on the issue of race and its predominance in the construction of the challenged districts. However, only Bennett includes any specific discussion of this subject in his Argument, and he does so only with respect to HD 86. Bennett at 29-30.

Bennett has not carried his burden to show that the trial court's finding about HD 86 is clearly erroneous. *See* F. R. Civ. P. 52; *Miller v. Johnson*, 515 U.S. 900, 918-19 (1995); *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982).

House District 86 is one of the three house districts nested within SD 29, which is grounded in the southeastern corner of Alabama. The problem with HD 86 is not simply that it has a common border with the "jagged fragments" of HD 85, which extend from the core of SD 29 north and west, but also that HD 85's obvious racial motivation overwhelms all of the senate district built around it – SD 29. The portions of HD 86 which reflect racial protrusions that split the City of Dothan are explainable only on racial grounds. App. 41a-42a. The district court reports that no one "point[ed] to any specific evidence to explain the race-based boundaries of HD 86." App. 42a.

Bennett's criticism of the trial court for focusing on the black population of Dothan is misplaced. Thus, Bennett's argument that the blacks of Dothan were segregated from the rest of the city in the 1983 plan is no justification for continuing the segregation. The court noted that the continued segregation could not be deemed the result of incumbent protection, because the incumbent who formerly represented

these black citizens of Dothan had been placed in HD 86. App. 42a.

Bennett's appeal to the compactness of HD 86 hardly dispels these problems. At most, it provides a basis for a more limited change of HD 86 when it must be redrawn, not that the finding of the trial court was erroneous.

B. The trial court correctly found that the alternate political explanation for these districts was not factually supported in the record. *(Responding to Sinkfield Question 2).*

Sinkfield has wrongly portrayed this case as one in which the district court's reliance on Reed's general purposes for black political advancement create a tension to be resolved between the First Amendment right of the ADC to associate and the requirement under the Fourteenth Amendment that a state comply with the mandates of *Shaw* when adopting electoral districts. Allegedly, the involvement of black political leader Joe Reed in the creation of the districts, and his general purpose to create more black districts, are activities that cannot be the basis for the trial court's order. *See* Sinkfield at 8-9; 24-25. The record does not bear out this characterization as true; and the effort to dress it up as a First Amendment infringement, or one which reflects tension with *Shaw*, is unjustified.

1. The trial court properly found the racial stereotyping undertaken by the districts' architect, and adopted by the state, as an act of segregation.

The record in this case reflects the kind of racial stereotyping in districting which is subject to strict scrutiny, and presumptively unconstitutional. The conduct leading to and the adoption of the 1993 consent judgment -- far from non-racial interest group negotiation -- is just what *Shaw* found to

be so troubling. The district court found that no recorded evidence supported the alleged associational interest claimed to satisfy strict scrutiny. App. 50a.

Sinkfield argues that Reed's use of block-level racial census data to construct the districts was not a form of computerized racial stereotyping, but a political exercise that was not respected properly by the district court. This is just not true. The district court found that Reed lacked the data needed to protect political associational interests, and was forced into an "overbroad proxy of race." App. 50a. As in *Bush v. Vera*, Reed had abundant racial data at the individual census block level, but had political data only at the precinct level. *See* 517 U.S. 952, 961 (1996). When the many individual precincts were torn apart into separate legislative districts, it was the racial data which was available. Moreover, it simply is not possible for anyone to know the political views of every black citizen in these census blocks. It is more likely that Reed really just assumed that all black citizens in Alabama share the same political views. Such assumptions reflect stereotyping, not good citizenship.

Sinkfield argues that Reed knew "from years of analyzing election returns" where ADC supporters and its allies resided. *See* Sinkfield at 13. But, according to the record here, election results are known only for entire precincts, and not for the census blocks from which these invalidated districts were drawn. No amount of "analyzing election returns" could predict the voting behavior of an individual census block.

Even if the Sinkfields' claims are understood as a genuine effort to credit the associational rights of an organized political group, the Alabama Democratic Conference, they were correctly rejected, as the record will not support this form of recasting. There was no proof that the ADC, or Reed, knew in which particular census block its registered members lived, much less its "supporters."

Thus, when the court found a district to be a racial classification, it was not controlled by Reed's general purposes.

And, in the particular districts where race was not shown by the plaintiffs to predominate in specific fashion, the district court dismissed the claims. It did so noting that Reed's general purpose was insufficient to sustain a claim. The district court's comment about HD 88 typifies the weight it gave to Reed's general purpose: "Reed has openly stated that his role in this process was to represent the interests of black voters, and that his primary goal was to increase black representation in the Alabama legislature . . . General evidence about Dr. Reed's goals in drawing the state-wide districting plan as a whole is not sufficient to show that HD 88 in particular was drawn for racial reasons." App. 224a. *See also* App. 232a (HD 82); 242a (HD 73).

The district court's findings reflect a record with specific acts of racial segregation by the state, and not a generalized antagonism toward black political association.[5]

2. The First Amendment does not justify, as narrowly tailored to advance compelling state interests, racial classifications adopted by the state.

In no event has a First Amendment question warranting review been created. It is well established that no political or other group has any First Amendment right to have the state adopt its racial perspectives embodied in statutes or court orders. Sinkfield has not been wronged because a federal district court refused, in its final order, to allow the state to emit racial messages.[6]

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[5]The ADC is merely one of at least two groups organized politically on a racial basis to advance the interests of black citizens. The other group is the New South Coalition ("NSC"). The ADC and NSC do not always support the same candidates in primary elections; and, on occasions, the NSC may support candidates other than Democrats in the general election. Reed cannot claim that he was acting for an alliance of ADC, NSC, and another group known as the Jefferson County Citizens Coalition in every aspect of the redistricting.

[6]*See Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S.

None of the cases affirming the right of political parties to autonomy or self-determination require that racially organized groups be able to implement their views on the racial treatment of citizens through state-ordered racial classifications. *See* Sinkfield at 25-26. There is certainly a difference between the state tolerating diverse views of private organizations about race as a matter of party autonomy, *see, e.g., California Democratic Party v. Jones*, 120 S. Ct. 2402, 2407 & n.5 (2000)(state cannot require that political parties conduct only blanket primary to choose nominees), and the state itself establishing racial classifications in its governance, its voting districts, or in the primary election process. The cases cited by Sinkfield on protecting political autonomy do not rise to the level of requiring judicial deference to the state's adoption of a political party's proposal for a racial classification.

Sinkfield wrongly says that the district court faulted "the efforts of Dr. Reed and his associates to aggregate their constituents as an 'act of segregation.'" Sinkfield at 26. Actually, the district court's use of the phrase "act of segregation" refers to the action of the state, as the following quotation shows:

> [T] he 'essence' of a Shaw claim has been that '**the State has used** race as a basis for separating voters into

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461 (1953). *See also, Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984)(*citing, Norwood v. Harrison*, 413 U.S. 455, 470(1973)). Sinkfield's exaggerated tone naturally undermines his credibility. No one is suggesting to "prohibit African-Americans from associating politically to seek equity for blacks." Sinkfield at 24. No one is suggesting the ADC or other black voter organizations in Alabama must constitute themselves differently. *Id.* at 25. No one is proposing to require the ADC to register all of its members. *Id.* at 26. No one is proposing to force the group to change the race-linked political message of the organization. *Id.* Plaintiffs insist only that when a government adopts a districting plan, the result of the political advocacy of the ADC or any other interest group will fall within constitutional bounds.

> districts.' *Id.* at 911, 115 S. Ct. at 2486 (emphasis added). **The act of segregation**, not racial composition alone, inflicts the constitutional harm; when an intent to racially segregate overrides a respect for political subdivisions and geographical communities, it 'convey[s] the message that political identity is, or should be, predominantly racial.'

App. 14a. (emphasis added)(*quoting Bush v. Vera*, 517 U.S. at 980-81).

There should be no exception to these rules when the state-embraced racial classification -- the act of segregation -- is the result of "skillful politics," even by those seeking fair, equitable representation for racial groups. *See* Sinkfield at 25. "Skillful politics" could be said to justify tolerating the success of the most invidious and racially motivated associations of the segregationist era designed to attain government action. The proper degree of respect given for "skillful politics" of the racial kind that succeeds in obtaining government action is reflected in the strict scrutiny required for reviewing racial classifications. *See Bush v. Vera*, 517 U.S. at 995 (O'Connor, J., concurring)("States, playing a primary role, and the courts, in their secondary role, are capable of distinguishing the appropriate and reasonably necessary uses of race from its unjustified and excessive uses."). Thankfully, Bennett does not offer the claim that Sinkfield asserts as a state interest, much less a compelling one required by strict scrutiny to withstand a *Shaw* challenge.

The district court understood the fundamental message of the *Shaw* case and its progeny and applied it correctly to a record reflecting racial stereotyping. The state's adoption of race in its actions is inherently exclusionary and requires the most stringent justification, regardless of whether the state's action was prompted by a group associated privately for racial objectives. This case does not involve discrete remedial actions undertaken in the name of remedying particularized past racial

discrimination. The district court's understanding was not "backwards," confused, or in need of reconciliation with the First Amendment.

III. The District Court Below Correctly Determined That The Plaintiffs' Claims Are Not Subject To Any Equitable Or Procedural Bar.

The procedural defenses of the Appellants warrant some brief review to assure proper identification of the plaintiff parties. The "Rice Plaintiffs" filed first in May 1997 in federal court, and they asserted claims against their particular Senate and House Districts as well as vote dilution claims against the structure of the entire plan, as well as their particular districts. App. 97a-99a; 97a-125a. Their claims were stayed pending presentation of their claims in state court, as ordered by the federal court, where the 1993 consent judgment had been entered between Sinkfield and Bennett's predecessor. App. 140a.

In October 1997, nine additional parties plaintiff, who resided in different districts from the Rice Plaintiffs, joined the federal action. App. 145a-150a; App.152a-154a. These persons were known originally as the "Thompson Plaintiffs," and they form the core group whose *Shaw* claims proceeded to trial in federal court. The Thompson Plaintiffs refused to present their claims to the state court. In November 1997, the state court rendered a judgment against the Rice Plaintiffs on the claims they presented there as part of their state court intervention. App. 156a- 179a.

Because of a pre-trial judgment in federal court against Plaintiff Thompson, the Plaintiffs who proceeded to trial in January 2000 are known as the "Kelley Plaintiffs." It is against the Kelley Plaintiffs that the procedural bars of laches, mootness, and *Rooker-Feldman* doctrine, are asserted. They are addressed in that order.

A. The district court acted within its equitable discretion in finding that injunctive relief for claims by the Kelley Plaintiffs was not barred by laches. ***(Responding to Bennett Question 2 and Sinkfield Question 4).***

"[T] he existence of Laches is a question primarily addressed to the discretion of the trial court." *Gardner v. Panama Railroad Co.*, 342 U.S. 29, 30 (1951)(per curiam). *See Lopez v. Monterey County*, 519 U.S. 9, 20 (1997). This Court normally accepts findings of lower courts "on factual considerations such as those underlying a determination of laches." *McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (Powell, Circuit Justice, 1976). Given the fact-intensive nature of the inquiry, the lower court's finding should not be disturbed. Not a single member of the three-judge court found Appellants' laches argument to have merit. App. at 8a- 9a.

The burdens to plead and prove laches are upon the Defendants/Appellants. Fed. R. Civ. P. 8(c). Elements include delay in bringing the claim and prejudice to the defense of the action. The Kelley Plaintiffs did not delay inexcusably in bringing this action seeking injunctive relief against use of gerrymandered state legislative districts. As the court below reported, the *Shaw v. Reno* analysis in the redistricting arena was new and somewhat uncertain at first in its contours. The 1997 filing was in time for relief in the 1998 elections. Thereafter, delay in achieving relief was a function of the aggressive defense put up by the State Appellants and the Sinkfield class, and the federal district court's stay from December 1997 to January 1999 while the Rice proceedings continued in state courts at trial and upon appeal.

The Appellants are not prejudiced in their defense of the case by the 1997 commencement of this lawsuit. *See Shuford v. Alabama Bd. of Educ.*, 920 F. Supp. 1233, 1240 (M.D. Ala 1996) ("The defendants have not shown a reason why it would be more difficult to litigate a section 5 claim today," rather than

earlier.) The State Appellants have been aware, since May 2, 1997, that various gerrymandered districts were being challenged. The claims of the Kelley Plaintiffs, who appeared shortly thereafter, and who remain in the case, should not be deemed to prejudice the State Appellants. The State Appellants insist that the case should have been brought even earlier. But this argument strikes a very hollow chord in view of the debate about the "standing" of the Kelley Plaintiffs, already presented. The actual relief ordered, an injunction against further use of the gerrymandered districts, further lessens any potential prejudice. The district court did not order new legislative boundaries to be drawn right before the census. Thus, it cannot be said that the stability and continuity of the legislative process are infringed, as suggested by the State Appellants. For these reasons, this Court should affirm the district court's correct determination that laches is no bar to the claims presented or the relief granted.

The cases cited by Appellants are not in conflict with the district court's decision. *See* Bennett at 20, Sinkfield at 29-30. Each is factually distinct. At the time Ms. Kelley and others filed suit, only one election had been held using the offending districts, which had been in force fewer than four years. By contrast, in *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990), the plaintiffs were challenging election districts that were seventeen years old. Moreover, the time of filing in the decennium – 1988 – was one year closer to the next set of elections than the filing by the Kelley Plaintiffs. The case of *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1353-54 (S.D.Fla. 1999) challenged a set of south Florida congressional districts established for use in the 1992 elections, but was filed April 2, 1998. Four elections had already been held by the time of the court's decision, and a similar *Shaw* challenge to another congressional district in the same state had been filed, adjudicated, and remedied prior to the 1996 elections. *Johnson v. Mortham*, 926 F. Supp. 1461 and 926 F. Supp 1540 (N.D. Fla. 1996). *Sanders v. Dooly County*, _ F. Supp.2d __, CA No.

98-00412-CV-2-DF-5 (M.D. Ga., May 11, 2000), appeal pending No. 00-12850-H (11th Cir.) involved a post-election 1998 challenge to an October 1992 plan already used in elections and a runoff in Dec. 1992, Jan. 1993, 1994, 1996, and 1998. *Maxwell v. Foster*, Civil Action No. 98-1378 (W.D. La. Nov. 24, 1999) involved a July 1998 challenge to a plan adopted in 1991 by the Louisiana legislature, and the decision was rendered after three elections had been held using the plan. *Cf., Shuford v. Alabama Bd. of Educ.*, 920 F. Supp. 1233, 1239 (M.D. Ala 1996)(claim of failure to obtain Section 5 preclearance not "barred by the equitable doctrine of laches" although the plaintiff "waited through two election cycles before filing suit.")

B. The district court correctly determined that the claims of the Kelley Plaintiffs were not moot. *(Responding to Bennett Question 3 and first portion of Sinkfield Question 3).*

Bennett wrongly asserts that the district court was required, in resolving the claims of the Kelley Plaintiffs for an injunction against future use of their districts, to accept the Alabama Supreme Court's determination of mootness for the claims of the Rice Plaintiffs. The district court correctly found that effective relief could be granted, and therefore that the case had not become moot. Under federal law, the imminence of the census is no basis for finding that Article III power, or that its equitable discretion, has evaporated in a redistricting controversy.

The trial court reported that it did not believe that future potential legislative action would change the districts under review and thereby avoid the need for relief. Appellants offer a mere hope that a proper redistricting will be in place before the 2002 regularly scheduled elections, and an expectation that Bennett will not be faced with conducting future elections using the districts ordered by the 1993 consent judgment. One

very clear fact supports the district court: "Alabama's long history of refusing to redistrict in a timely fashion makes it possible to provide the plaintiffs meaningful relief . . . ." App. 12a n.8. *See also, Burton v. Hobbie*, 561 F. Supp. 1029, 1032-34 (M.D. Ala. 1983)(3-judge court)(ordering special elections following legislative correction of defects in previous legislative plan).

Under the law governing mootness, the expectation of a potential change in the Defendants' action is insufficient to establish mootness. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 120 S.Ct. 693, 708 (2000). It must be "absolutely clear" that the challenged conduct will not recur. *Id. See also, United States v. Concentrated Phosphate Export Assn, Inc.* 393 U.S. 199, 203 (1968)).

Bennett has come nowhere close to meeting this standard, and nothing in the record requires a conclusion that the trial court was incorrect. There is not even a back-up alternative districting plan to be used in place of the challenged plan or in the event a change in population reflected in the 2000 census figures makes it too difficult for the legislature to agree on a redesign of the districts so as to eliminate the race-based districts. *See Hunt v. Cromartie*, 119 S.Ct. 1545, 1548 n.1 (1999); *Whitcomb v. Chavis*, 403 U.S. 124, 140-41 (1971).

Bennett's status as a party to the state court decree presents another complicating factor in the effort to prove mootness. *See* App. 156a to 179a. Even if a new plan is passed by the legislature, it must obtain the blessing of the state court, which issued the 1993 consent judgment. That court continues to retain jurisdiction over Bennett.

Moreover, the district court correctly declined to follow the mootness determination of the Alabama Supreme Court. As the district court reports, it was not presented with any evidentiary indication that the precise relief sought by the Kelley Plaintiffs, including holding special elections in any invalidated districts, was also sought in the Alabama Supreme Court.

Regardless of whether the Alabama Supreme Court was presented with a request for the same relief as the district court ultimately ordered, the district court had an obligation to determine for itself the mootness issue. *See Liner v. Jafco, Inc.*, 375 U.S. 301, 304 (1964).

Bennett's assertion that the Alabama Supreme Court's decision reflected a universal understanding of mootness doctrine is incorrect. *See* Bennett at 23. Even though federal cases were cited in a footnote by way of example, the Alabama Supreme Court applied a different standard from what is applied in the federal system. In the state court, in districting matters, the decision maker "must assume that the Legislature will timely fulfill its constitutional duty to redraw legislative districts based on [the 2000] census." App. 198a. As noted above, the federal courts are instructed to assume that challenged conduct will recur and to make findings if the assumption is incorrect.[7]

Finally, even if this Court were to assume that Bennett would not use these districts again in the future, the collateral consequences, and the continuing effects of their past usage prevent dismissal on mootness grounds. *See, e.g., Reno v. Bossier Parish School Bd.*, 120 S.Ct. 866, 871 (2000)(past districts remain as benchmark for retrogression analysis under Section 5 of the Voting Rights Act.). The districts used previously by Bennett in the past also inevitably will be invoked as a pattern for future districts, unless invalidated. They "serve as the starting point for the next reapportionment," for evaluating future plans in light of traditional districting principles such as deference due to protection of incumbents, or

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[7] This difference in perspective on the justiciability of claims is not unusual. Alabama courts did not find one person-one vote claims to be justiciable until the consent judgment related to this case was entered in 1993. *See Brooks v. Hobbie*, 631 So. 2d 883 (Ala. 1993), *overruling, Waid v. Pool*, 255 Ala. 441, 51 So. 2d 869 (1951). By contrast, federal courts have found such claims justiciable since 1962. *See Baker v. Carr*, 369 U.S. 186 (1962).

simply in identifying core areas for any future plan. App. at 12a.

For these reasons, the claims made by the Kelley Plaintiffs are not moot.

1. The Appellants' invocation of the *Rooker-Feldman* doctrine is mistaken.

The Appellants seek an extraordinary application of the *Rooker-Feldman* doctrine as a basis for review of the district court decision. *See* Bennett at 24; Sinkfield at 28. The state court decision which allegedly should have been reviewed by this Court is one controlled by state law. The state court decision was based on mootness, a state procedural issue reflective of the justiciability of the claims. *See supra* at n.9. *See also, Baker v. Carr*, 369 U.S. 186, 235-36 (1962). Under such circumstances, 28 U.S.C. § 1257 provided no basis for review here, or for barring original federal district court jurisdiction of claims or defenses said to be already addressed.

The Appellants seem to suggest that the bar should apply because the Rice Plaintiffs faced the same argument in state court that the Kelley Plaintiffs face in federal court. *See* Bennett at 25; Sinkfield at 28-29. But none of the persons in federal court is a party to the state court proceedings. Under such circumstances, a conventional understanding of appellate review, and application of *Rooker-Feldman* doctrine, plainly means that the district court did not sit as an appellate court in review of a state court decision. None of the Appellees here had the right to seek an appeal of the state court proceedings.

In *Johnson v. DeGrandy*, 512 U.S. 997 (1994), this Court refused to apply the *Rooker-Feldman* doctrine to find that previous redistricting proceedings before the Florida courts prevented the federal district court from hearing the claims of a non-party against the same districting plan. *See* 512 U.S. at 1005-06. The Kelley Plaintiffs similarly sought to have their *Shaw* claims litigated for the first time in the federal district

court, and the district court did not review any *Shaw* ruling of the state court in the *Rice* proceedings.

In addition to the fact that the Kelley Plaintiffs were not parties to the state court proceedings, none of the *Shaw* claims adjudicated by the district court was the subject of a *Shaw* claim in the *Rice* state court proceedings. The *Shaw* claims adjudicated by the district court are directed at, and result in relief against, several discrete legislative districts established by agreement of Bennett and Sinkfield, without the usual adverseness of a judicial proceeding. App. at 215a-216a. A careful review of the Appellants' filings shows that they do not assert a contrary position. Rather, the Appellants assert that these *Shaw* issues asserted against particular districts adopted between Bennett and Sinkfield should have been raised in the state court. In view of the strict requirements for standing to raise *Shaw* claims, their position is untenable.

Alternatively, Bennett claims that the Kelley Plaintiffs were required to intervene in the state court proceedings undertaken by the Rice Plaintiffs. According to Appellants, failing intervention by the Kelley Plaintiffs, their issues should be deemed to have been waived under the *Rooker-Feldman* doctrine. *See* Bennett at 25 (discussing opportunity to intervene in state court proceedings).

No case has ever adopted such a radical view of how to understand the district court's original jurisdiction, or how to construe the manner in which § 1257 limits the original jurisdiction of the district court. The *Feldman* case itself holds that the district court had jurisdiction to hear Feldman's general challenge "to assess the validity of a rule promulgated in a non-judicial proceeding," even though the same court lacked jurisdiction over his claims about his particular situation. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 485 (1983) (finding claims against rule not "inextricably intertwined" with particular claims against denial of admission to bar).[8]

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[8] Bennett attempts to equate the determination that privity exists, for *res*

Finally, to bar district court jurisdiction because, as Bennett maintains, "[t] he same attorney orchestrated all the claims," of both the Rice Plaintiffs and the Kelley Plaintiffs would be improper. *See* Bennett at 26. This Court has not accepted the proposition that mere representation by a common counsel and the assertion of a similar legal claim is sufficient to trigger claim preclusion against a non-party. *See, e.g., South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 167 (1999). Similarly, the presence of the same counsel should be no justification for finding the jurisdiction of the district court blocked by the *Rooker-Feldman* doctrine.

2. The district court correctly determined that the Kelley Plaintiffs are not precluded by the determination of the issues raised by the Rice Plaintiffs in their state court proceedings. *(Responding to second portion of Sinkfield Question 3).*

Sinkfield also attacks the trial court for allegedly showing a "blatant disrespect for federalism" and ignoring "full faith and credit" by allegedly sanctioning multiple separate lawsuits for *Shaw* claims against other districts. Despite his high-pitched rhetoric, Sinkfield never points to any particular district claims or issues that were heard improperly, or were adjudicated in a manner that conflicts with a state court judgment.

Shaw claims are particularized to the district in which a plaintiff resides or from which he is personally excluded. The

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judicata purposes, between the Rice Plaintiffs and the Kelley Plaintiffs, as to certain claims, to bar the Kelley Plaintiffs for an alleged failure to intervene in the *Rice* state court proceedings to adjudicate *Shaw* claims for their own individual districts. *See* Bennett at 24-25. In November 1997, after the state court ruled against the Rice Plaintiffs, Bennett himself advised the federal trial court that the state court lacked authority to adjudicate the *Shaw* claims of the Kelley Plaintiffs, who were not parties, and that the federal court had a duty to hear their claims. App. 24b.

district court was correct when it unanimously ruled on July 2, 1999:

> [T] he state court expressly limited the Rice plaintiffs' gerrymandering claim to the districts in which the Rice plaintiffs reside: House Districts 79 and 83 and Senate Districts 27 and 28. The other Thompson plaintiffs live in districts outside of those addressed by the state court, and their gerrymandering claims could not have been asserted by the Rice plaintiffs for lack of standing.

App. at 215a-216a. That the district court below carefully sifted through other claims, and determined that certain others were barred, supports the conclusion that the *Shaw* claims of the Kelley plaintiffs were properly before the district court.

Sinkfield asserts that the Thompson/Kelley Plaintiffs "sought to represent a class identical to the class the Rices had sought to represent in their pleadings." Sinkfield at 27. The class claims the Rice and Kelley plaintiffs originally sought to assert challenged a stark pattern of under populating majority black districts and overpopulating majority white districts, and a claim that the districts had a deviation slightly greater than the often-accepted 10% level. The Kelley Plaintiffs' claims of this sort thus were not entertained by the federal district court below. It is clear that no plaintiff class was ever certified in the 1997 *Rice* state court case. Thus, even though they may have pled, in part, the same global claims, that does not bar the *Shaw* claims adjudicated in individual district specific fashion by the trial court.

There is nothing in the case of *Growe v. Emison*, 507 U.S. 25, 36 (1993) which requires that preclusion law apply to bar the Kelley Plaintiffs' *Shaw* claims. In fact, *Growe* allows a federal suit subsequent to state proceedings, does not require federal plaintiff to intervene in the state proceedings, as the

Rice Plaintiffs were directed to do here, and in some cases requires that state court findings be disregarded. *Id.* at 35-39.

The deference shown by the federal court is typical of the practical operation of the comity shown by judges in resolving election districting disputes. There has been no question about which system is supreme, and no successful (or confusing) effort to force federal courts to accept the factual findings of the states courts involving disputes between persons who were not parties.[9] The problem envisioned by Sinkfield is really one of his own making, in this case, and is not sufficiently substantial to warrant review.

C. Alabama's system of government erects no bar to adjudication of *Shaw* liability or to the remedy imposed by the district court, at this point in the decade. *(Responding to Bennett Question 4).*

Bennett also asserts that the district court should be reversed because it "did not find a remedy that is workable within the confines of Alabama's system of government," and therefore was without a case or controversy that would justify the exercise of judicial power, or the finding of liability in a *Shaw* redistricting case. *See* Bennett at 26-27. This challenge to the district court's opinion relies on vote dilution cases in which courts were asked to transform an electoral system from at-large to single member districts for the sake of remedying the allegedly dilutive effects on racial minority groups.

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[9] *See, e.g., Ex parte Collins*, 717 So.2d 998 (Ala. 1998)(directing vacation of racially gerrymandered consent decree for school board districts); *Wesch v. Folsom*, 6 F. 3d 1465 (11th Cir. 1993), *cert. denied*, 510 U.S. 1046 (1994)(enjoining same Sinkfield parties from attempting to circumvent federal court Congressional district plan with state court action); *Brooks v. Hobbie*, 631 So.2d 883 (Ala. 1993)(welcoming certified question from federal court in State legislative redistricting). *See also*, J.P. Lisenby, *Racial Politics Alive and Well In Alabama: The Impact of Recent Voting Rights Decisions On Alabama's Electoral Districts*, 46 Ala. L. Rev. 641 (1995).

These cases do not support Bennett's argument. No case has ever found that the state's professed intention to change at-large elections to single member districts at a point in the future made remedial action not "workable within the confines of [the State's] system of government." Thus, in *Whitcomb v. Chavis*, 403 U.S. 124, 140 (1971), even the issuance of new census data, after the district court's decision, did not avoid the need to address the validity of the at-large electoral structure being challenged.

Holder v. Hall, 512 U.S. 874 (1994), turns on the difficulty that a federal court faces in choosing a standard by which to measure whether a racial minority group is impacted by an electoral structure so as to dilute its group voting strength, under Section 2 of the Voting Rights Act. 42 U.S. C. § 1973. *Holder* nowhere even suggests that the need for redistricting, in light of impending decennial census results, destroys the court's ability to design relief, or find liability. Thus, the reluctance to find liability arising from the inability to identify a standard for liability, identified in *Holder v. Hall*, has no application here.

The inconsistency of Bennett's criticism, in this section, of the district court's remedy also evidences the lack of support for his argument. On the one hand, Bennett insists that the injunction against using the gerrymandered districts is both unduly "intrusive," and, on the other hand, that the injunction imposes "no substantive relief." *See* Bennett at 28. Bennett does not claim that the injunction is destructive of the process of electing representatives, in a manner analogous to the effort at judicial subdistricting found harmful to judicial administration by the Eleventh Circuit in *Nipper v. Smith*, 39 F. 3d 1434 (11th Cir. 1994)(en banc), *cert. denied,* 514 U.S. 1083 (1995).

None of Bennett's criticism refers to a single *Shaw* case which declines to issue relief for the reasons invoked here. The district court's injunction against any future use of the districts found to be racially gerrymandered is a properly circumscribed

form of relief. It provides the State the traditional opportunity, in the first instance, to design any replacement districts that are needed in the future.

At bottom, Bennett is attempting to transform the equitable restraint shown by the district court, in not ordering him to conduct special elections, against it. Bennett merely seeks to have this Court second-guess the trial court's discretion to issue relief, and has dressed up his claim, without any basis, to assert that the relief issued was not "workable."

CONCLUSION

The trial court properly evaluated the direct and circumstantial evidence, and correctly applied the settled law of standing and equal protection and other doctrines as directed by this Court. Neither Bennett nor Sinkfield has raised any issues that warrant further review or that would justify reversal. Accordingly, the Court should grant Appellee's Motion for summary affirmance of the judgment below, or in the alternative dismiss the appeal.

Respectfully submitted,

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APPENDIX

ALL PRECINCT SPLITS FOR SELECTED ALABAMA HOUSE DISTRICTS (63, 73, 75, 86 AND 89)

County	Precinct Name	House District	% White	% Black	Total Pop	Total White	Total Black	Other
Dale	Rocky Road #7	85	73.5%	19.7%	6344	4661	1251	432
		89	98.6%	1.0%	518	511	5	2
		93	67.6%	32.4%	34	23	11	0
	Echo 9	89	98.9%	0.3%	1045	1033	3	9
		85	100.0%	0.0%	234	234	0	0
	Ewell 14	89	95.9%	3.2%	1132	1086	36	10
		85	40.3%	58.6%	486	196	285	5
		93	89.8%	6.6%	381	342	25	14
	Ozark 1	89	95.4%	4.1%	1693	1615	69	9
		85	63.3%	34.8%	8322	5267	2893	162
		93	86.9%	10.9%	4704	4086	513	105
	Marley Mill 15	89	94.0%	4.5%	1525	1434	69	22
		85	52.3%	46.9%	386	202	181	3

County	Precinct Name	House District	% White	% Black	Total Pop	Total White	Total Black	Other
Elmore	Grandview Pines	75	83.4%	15.7%	3618	3016	569	33
	(City Hall)	88	83.6%	15.5%	1119	935	173	11
	Millbrook	75	78.0%	21.3%	4468	3487	952	29
	Memorial Ctr.	88	83.4%	15.6%	1260	1051	197	12
	Redland Fire	75	95.6%	3.5%	1056	1010	37	9
	Station	31	68.0%	31.6%	1284	873	406	5
	Fain Comm. Ctr.	75	40.1%	59.9%	1467	589	878	0
		31	100.0%	0.0%	2	2	0	0
	Nat'l Guard	75	94.9%	5.1%	79	75	4	0
	Armory	31	78.7%	19.9%	1780	1401	355	24
Houston	Max Snell Farm	86	95.2%	0.0%	355	338	0	17
	Equip.	87	85.8%	13.3%	1129	969	150	10
		93	88.4%	11.0%	155	137	17	1
	Doug Tew	86	90.4%	8.1%	5933	5365	480	88
	Center	87	89.1%	8.9%	1374	1224	122	28
		93	90.2%	8.1%	6776	6115	552	109

County	Precinct Name	House District	% White	% Black	Total Pop	Total White	Total Black	Other
Houston (Continued)	Westgate Park	86	98.5%	0.9%	788	776	7	5
		87	95.1%	2.9%	5420	5155	156	109
		93	95.4%	3.3%	1534	1463	50	21
	Taylor City Hall	86	97.6%	2.4%	254	248	6	0
		87	97.4%	1.9%	1484	1446	28	10
	Rehobeth Vol. Fire Dept.	86	96.4%	3.1%	752	725	23	4
		87	97.5%	1.8%	1278	1246	23	9
	Kinsey City Hall	86	94.9%	5.1%	158	150	8	0
		85	72.1%	27.9%	1528	1101	426	1
	Johnson Homes	86	87.8%	12.2%	164	144	20	0
		85	6.8%	93.0%	6046	411	5621	14
	NG Armory - 3d Ave.	86	79.6%	19.0%	9251	7362	1758	131
		85	100.0%	0.0%	13	13	0	0
	Lincoln Center	85	0.9%	99.1%	1103	10	1093	0
		86	96.3%	3.7%	218	210	8	0

County	Precinct Name	House District	% White	% Black	Total Pop	Total White	Total Black	Other
Montgomery	Cloverdale	73	95.2%	4.2%	5598	5327	236	35
	Comm. Ctr.	77	83.4%	16.0%	1579	1317	253	9
	J. Patterson	73	69.1%	29.1%	1114	770	324	20
	Tech. Sch.	76	42.7%	56.1%	6666	2844	3742	80
	Seth Johnson	73	73.4%	24.6%	6097	4477	1500	120
	Elem. Sch.	76	100.0%	0.0%	12	12	0	0
	G. Washington	75	87.3%	10.6%	710	620	75	15
	Jr. High Sch.	76	22.2%	77.0%	3232	719	2489	24
	Normandale	73	84.8%	14.6%	4592	3893	671	28
	Library	76	39.3%	59.8%	731	287	437	7
		77	29.3%	70.6%	1526	447	1077	2
	Pinedale	75	71.5%	27.4%	3615	2583	991	41
	Comm. Ctr.	76	42.3%	57.3%	4598	1943	2634	21
	Aldersgate U.	73	84.0%	14.2%	4115	3458	584	73
	Meth.	75	92.6%	5.2%	2457	2275	127	55

County	Precinct Name	House District	% White	% Black	Total Pop	Total White	Total Black	Other
Tuscaloosa	Regional Educ.	70	28.7%	71.3%	1938	556	1381	1
	Ctr.	63	81.9%	16.7%	210	172	35	3
	Army Reserve	70	28.1%	71.3%	6295	1772	4486	37
	Ctr.	63	89.8%	9.2%	2726	2447	250	29
	Bama Mall	70	40.6%	58.9%	5548	2255	3267	26
		63	85.2%	13.0%	3805	3240	493	72
		62	85.9%	12.2%	361	310	44	7
	County	70	90.7%	6.5%	1625	1474	106	45
	Courthouse	63	80.0%	12.4%	3944	3156	488	300
	Clara Verna	70	75.4%	21.7%	5822	4388	1262	172
	Towers	63	74.6%	25.2%	389	290	98	1
	Coliseum	70	88.6%	8.5%	1040	921	88	31
		63	77.0%	19.7%	3222	2481	634	107
	Jaycee Park	70	70.6%	27.9%	1137	803	317	17
		63	70.6%	28.3%	5200	3672	1472	56

County	Precinct Name	House District	% White	% Black	Total Pop	Total White	Total Black	Other
Tuscaloosa (Continued)	McFarland Mall	62	80.4%	18.0%	12056	9687	2174	195
		63	95.9%	2.2%	715	686	16	13
		70	22.8%	77.0%	696	159	536	1
	Holt Armory	70	38.7%	61.3%	775	300	475	0
		63	66.9%	32.7%	4103	2745	1343	15
	Old Hope School S	14	99.1%	0.7%	861	853	6	2
		63	97.9%	0.9%	583	571	5	7
	N'port Armory,	63	86.0%	6.2%	924	795	57	72
	City Hall	61	85.6%	13.3%	8740	7478	1164	98
	#6 Fire Station	63	93.7%	5.4%	3641	3412	197	32
		62	77.5%	22.4%	1238	959	277	2

ALL PRECINCT SPLITS FOR SELECTED ALABAMA SENATE DISTRICTS
(21, 25, 29, 30 and 34)

County	Precinct Name	Sen. Dist	% White	% Black	Total Pop	Total White	Total Black	Other
Dale	Rocky Road #7	29	73.5%	19.7%	6344	4661	1251	432
		30	98.6%	1.0%	518	511	5	2
		31	67.6%	32.4%	34	23	11	0
	Daleville #3	29	71.7%	23.6%	3827	2745	902	180
		31	82.9%	9.8%	3704	3070	364	270
	Echo 9	30	98.9%	0.3%	1045	1033	3	9
		29	100.0%	0.0%	234	234	0	0
	Ewell 14	30	95.9%	3.2%	1132	1086	36	10
		29	40.3%	58.6%	486	196	285	5
		31	89.8%	6.6%	381	342	25	14
	Ozark 1	30	95.4%	4.1%	1693	1615	69	9
		29	63.3%	34.8%	8322	5267	2893	162
		31	86.9%	10.9%	4704	4086	513	105

County	Precinct Name	Sen. Dist	% White	% Black	Total Pop	Total White	Total Black	Other
Dale (Continued)	Marley Mill 15	30	94.0%	4.5%	1525	1434	69	22
		29	52.3%	46.9%	386	202	181	3
	Level Plains 16	31	85.1%	11.4%	3204	2727	365	112
		29	43.3%	54.8%	425	184	233	8
	Pinckard 6	29	100.0%	0.0%	2	2	0	0
		31	90.7%	9.0%	1686	1530	152	4
Elmore	Grandview Pines	25	83.4%	15.7%	3618	3016	569	33
	(City Hall)	30	83.6%	15.5%	1119	935	173	11
	Millbrook	25	78.0%	21.3%	4468	3487	952	29
	Memorial Ctr.	30	83.4%	15.6%	1260	1051	197	12
	Redland Fire	5	68.0%	31.6%	1284	873	406	5
	Station	11	95.6%	3.5%	1056	1010	37	9
	Fain Comm.	11	100.0%	0.0%	2	2	0	0
	Ctr.	25	40.1%	59.9%	1467	589	878	0
	National Guard	11	78.7%	19.9%	1780	1401	355	24
	Armory	25	94.9%	5.1%	79	75	4	0

County	Precinct Name	Sen. Dist	% White	% Black	Total Pop	Total White	Total Black	Other
Hale	Moundville 12	24	36.4%	63.6%	107	39	68	0
		21	71.5%	28.2%	2354	1684	663	7
Henry	Nat'l Guard	28	87.7%	11.2%	1685	1478	188	19
	Armory #10	29	33.4%	66.5%	2151	719	1430	2
	Capps A, Espy	28	58.0%	41.2%	398	231	164	3
	Farms B	29	46.4%	53.4%	468	217	250	1
	Edwin	28	66.4%	33.6%	295	196	99	0
	Comm. #14	29	9.5%	90.5%	211	20	191	0
	Headland Nat'l	28	90.3%	9.5%	2846	2571	269	6
	Guard #1	29	28.8%	70.8%	1207	348	855	4
	Blankenship #8	28	95.5%	4.5%	44	42	2	0
		29	81.6%	18.4%	136	111	25	0
Houston	Max Snell Farm	31	88.4%	11.0%	155	137	17	1
	Equip.	29	88.1%	10.1%	1484	1307	150	27

County	Precinct Name	Sen. Dist	% White	% Black	Total Pop	Total White	Total Black	Other
Houston (Continued)	Doug Tew	31	90.2%	8.1%	6776	6115	552	109
	Center	29	90.2%	8.2%	7307	6589	602	116
	Houston Love	31	84.5%	14.3%	4537	3836	650	51
	Library	29	15.7%	83.7%	3647	574	3054	19
	Westgate Park	31	95.4%	3.3%	1534	1463	50	21
		29	95.5%	2.6%	6208	5931	163	114
Lowndes	National Guard	30	88.6%	11.4%	316	280	36	0
		23	53.4%	46.6%	251	134	117	0
	Sandy Ridge	30	83.9%	16.1%	372	312	60	0
		23	38.3%	60.8%	600	230	365	5
	General Electric	30	94.8%	5.2%	134	127	7	0
		23	78.1%	20.4%	137	107	28	2
	Cannon Hill	30	60.9%	39.1%	345	210	135	0
		23	40.2%	59.3%	701	282	416	3

County	Precinct Name	Sen. Dist	% White	% Black	Total Pop	Total White	Total Black	Other
Mobile	Augusta Evans	34	80.6%	18.4%	2374	1914	438	22
	School	33	42.8%	57.0%	790	338	450	2
	Murphy H.S.	34	96.0%	3.9%	519	498	20	1
	Library	33	94.2%	4.7%	1701	1602	80	19
	Westlawn School	34	86.4%	12.7%	3608	3116	460	32
		33	21.7%	77.8%	1283	279	998	6
	Holloway School	34	90.5%	9.1%	231	209	21	1
		33	1.3%	98.4%	8967	117	8828	22
	St. John	34	92.3%	6.6%	3664	3382	242	40
	Methodist	33	85.2%	12.7%	2441	2079	311	51
	Hillsdale School	34	79.8%	16.2%	4942	3944	801	197
		33	17.1%	81.7%	1282	219	1047	16
	Havenswood	34	99.3%	0.6%	1142	1134	7	1
	Baptist Church	33	98.9%	0.0%	378	374	0	4
	Lott Road Florist	34	98.5%	0.7%	669	659	5	5
		33	91.6%	7.8%	2623	2403	205	15

County	Precinct Name	Sen. Dist	% White	% Black	Total Pop	Total White	Total Black	Other
Mobile (Continued)	Pleasant View	33	25.5%	74.3%	1253	320	931	2
	Bapt.	34	98.0%	0.9%	6376	6247	56	73
	Montgomery	33	97.4%	1.3%	838	816	11	11
	School	34	98.4%	0.6%	9940	9784	56	100
	Rickarby Park	34	98.0%	2.0%	152	149	3	0
		35	36.7%	62.8%	5773	2116	3626	31
	Pleasant Valley	34	87.0%	11.1%	2742	2386	305	51
	Meth.	35	76.3%	23.3%	506	386	118	2
	Edwards Fire	34	94.7%	0.0%	75	71	0	4
	Station	35	89.8%	9.3%	6007	5395	556	56
	Morningside	34	75.0%	22.9%	48	36	11	1
	School	35	81.5%	17.4%	7369	6008	1283	78
	Greystone	34	93.2%	5.5%	4456	4155	247	54
	Christian Sch.	35	84.6%	15.0%	507	429	76	2
	Woodridge	34	95.9%	3.2%	5706	5472	183	51
	Baptist Church	35	97.8%	0.9%	2178	2129	20	29
	Dees Pecan Co.	34	92.7%	6.1%	245	227	15	3
		35	82.5%	16.6%	1556	1284	259	13

County	Precinct Name	Sen. Dist	% White	% Black	Total Pop	Total White	Total Black	Other
Mobile (Continued)	Meadowlake	34	62.7%	36.3%	1340	840	487	13
	School	35	96.1%	2.7%	5942	5711	162	69
Montgomery	Cloverdale	25	95.2%	4.2%	5598	5327	236	35
	Comm. Ctr.	26	83.4%	16.0%	1579	1317	253	9
	J. Patterson	25	69.1%	29.1%	1114	770	324	20
	Tech. Sch.	26	42.7%	56.1%	6666	2844	3742	80
	Capitol Heights	25	85.9%	11.9%	6202	5327	737	138
	Comm. Ctr.	26	30.9%	68.9%	810	250	558	2
	Highland Gardens	25	94.7%	2.9%	2911	2757	83	71
	Comm. Ctr.	26	90.2%	9.2%	2426	2188	222	16
	Lagoon Park Fire	25	94.4%	4.4%	5833	5505	259	69
	Station	26	80.0%	13.8%	1348	1079	186	83
	North Montg.	25	85.2%	12.7%	2041	1739	259	43
	Comm. Ctr.	26	11.1%	88.6%	3841	426	3405	10
	Seth Johnson	25	73.4%	24.6%	6097	4477	1500	120
	Elem. Sch.	26	100.0%	0.0%	12	12	0	0

County	Precinct Name	Sen. Dist	% White	% Black	Total Pop	Total White	Total Black	Other
Montgomery (Continued)	G. Washington	25	87.3%	10.6%	710	620	75	15
	Jr. High Sch.	26	22.2%	77.0%	3232	719	2489	24
	Normandale	25	84.8%	14.6%	4592	3893	671	28
	Library	26	32.5%	67.1%	2257	734	1514	9
	Pinedale Comm.	25	71.5%	27.4%	3615	2583	991	41
	Ctr.	26	42.2%	57.3%	4597	1942	2634	21
Pickens	Reform	21	62.2%	37.7%	2133	1327	805	1
		6	100.0%	0.0%	96	96	0	0
Tuscaloosa	Big Sandy	24	23.2%	76.8%	371	86	285	0
	Baptist Church	21	75.7%	24.1%	1931	1461	466	4
	Myrtlewood	24	49.3%	50.3%	1030	508	518	4
	Sch. Comm. Ctr.	21	87.1%	11.8%	788	686	93	9
	Regional Educ.	24	28.7%	71.3%	1938	556	1381	1
	Ctr.	21	81.9%	16.7%	210	172	35	3

County	Precinct Name	Sen. Dist	% White	% Black	Total Pop	Total White	Total Black	Other
Tuscaloosa (Continued)	Army Reserve	24	28.1%	71.3%	6295	1772	4486	37
	Ctr.	21	89.8%	9.2%	2726	2447	250	29
	Bama Mall	24	40.6%	58.9%	5548	2255	3267	26
		21	85.2%	12.9%	4166	3550	537	79
	County	24	90.7%	6.5%	1625	1474	106	45
	Courthouse	21	80.0%	12.4%	3944	3156	488	300
	Clara Verna	24	75.4%	21.7%	5822	4388	1262	172
	Towers	21	74.6%	25.2%	389	290	98	1
	Coliseum	24	88.6%	8.5%	1040	921	88	31
		21	77.0%	19.7%	3222	2481	634	107
	Jaycee Park	24	70.6%	27.9%	1137	803	317	17
		21	70.6%	28.3%	5200	3672	1472	56
	McFarland Mall	24	22.8%	77.0%	696	159	536	1
		21	81.2%	17.1%	12771	10373	2190	208
	Holt Armory	24	38.7%	61.3%	775	300	475	0
		21	66.9%	32.7%	4103	2745	1343	15

County	Precinct Name	Sen. Dist	% White	% Black	Total Pop	Total White	Total Black	Other
Tuscaloosa (Continued)	BF Goodrich	24	52.1%	47.7%	932	486	445	1
	Union Hall	21	80.0%	20.0%	40	32	8	0
	Hillcrest High	24	62.3%	37.7%	308	192	116	0
		21	85.4%	14.0%	2968	2535	415	18
	Mount Olive	5	97.7%	0.0%	215	210	0	5
	Fire Station	21	99.3%	0.0%	2099	2084	0	15
	Macedonia	5	99.1%	0.5%	2831	2806	14	11
	Methodist	21	84.9%	14.4%	994	844	143	7
	Chapel Hill	5	96.2%	3.5%	1941	1867	68	6
	Baptist	21	21.9%	78.1%	32	7	25	0
	Old Hope	5	99.1%	0.7%	861	853	6	2
	School Site	21	97.9%	0.9%	583	571	5	7
	Buhl School/	21	95.3%	3.4%	2830	2696	96	38
	Westwood Sch.	24	43.8%	55.3%	436	191	241	4

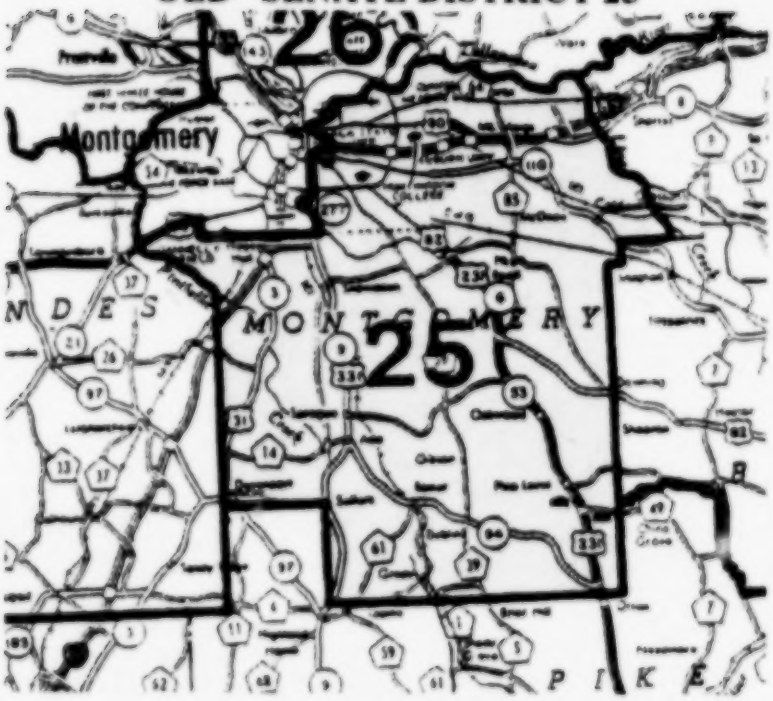
"OLD" SENATE DISTRICT 21



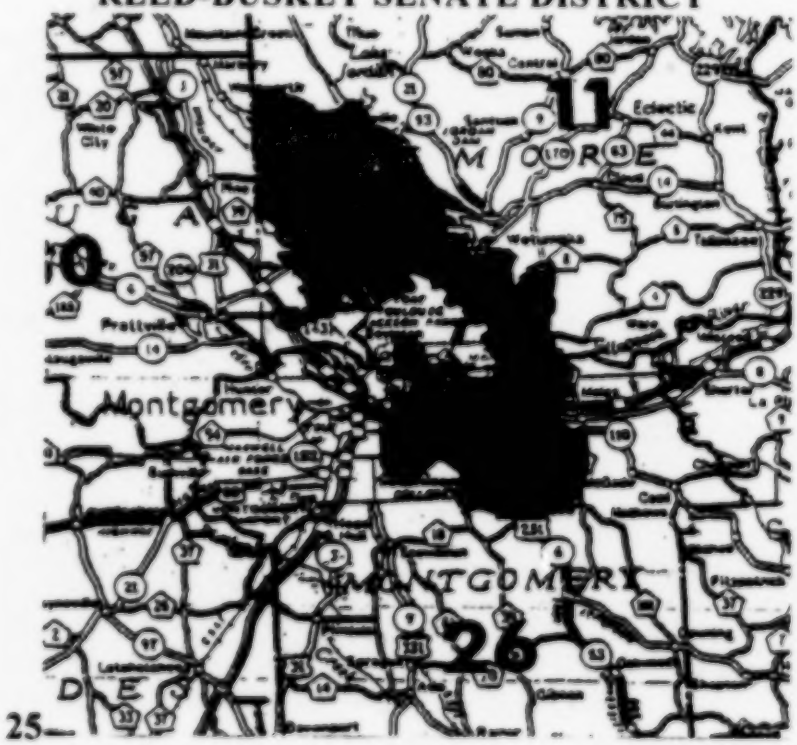
REED-BUSKEY SENATE DISTRICT 21



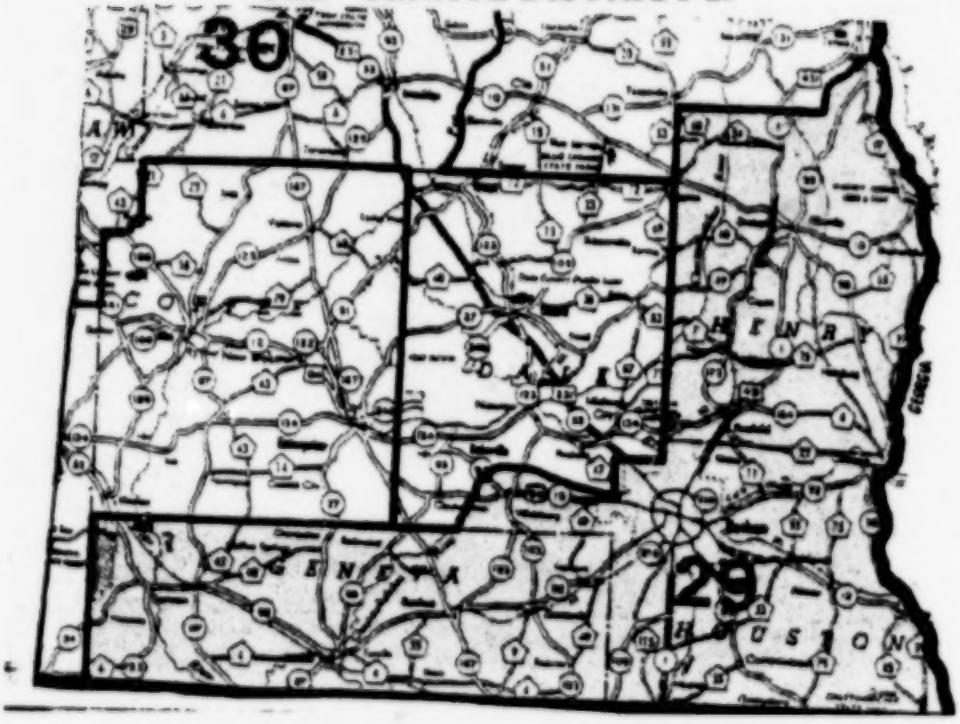
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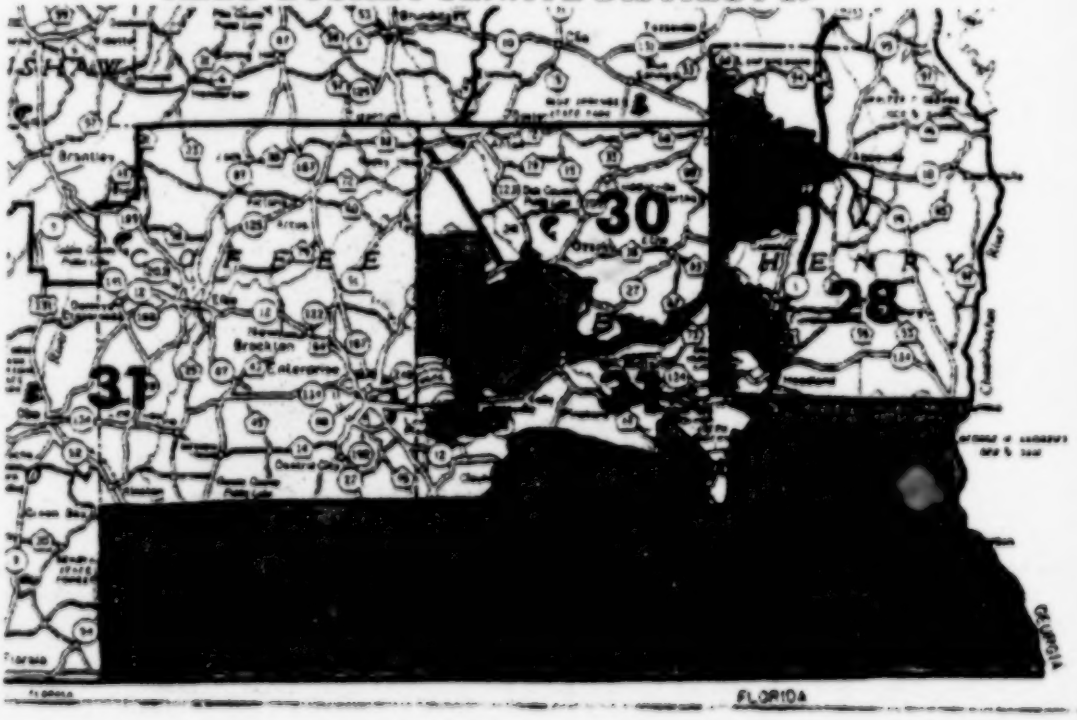
REED-BUSKEY SENATE DISTRICT



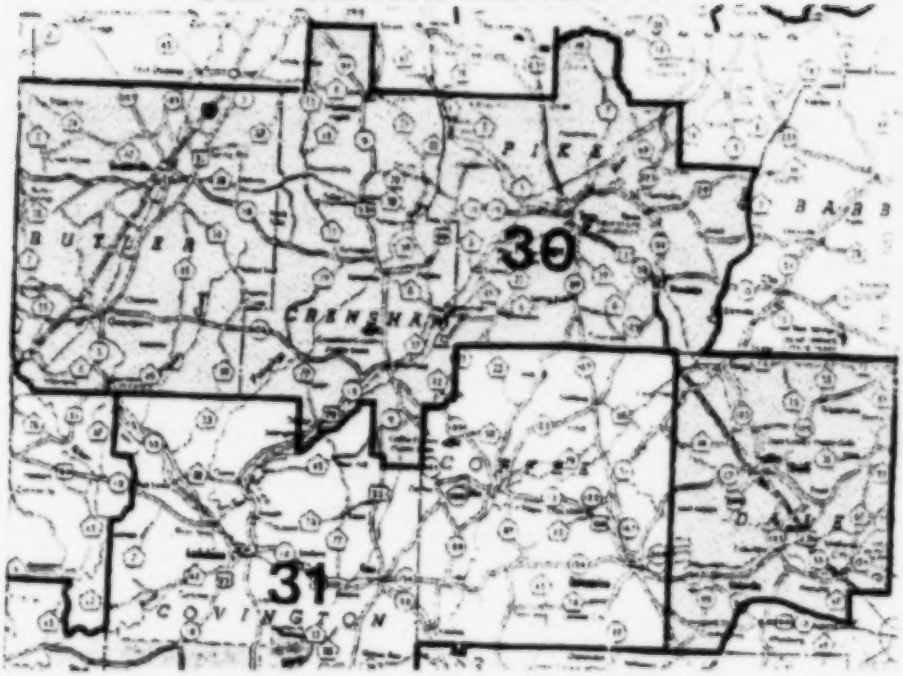
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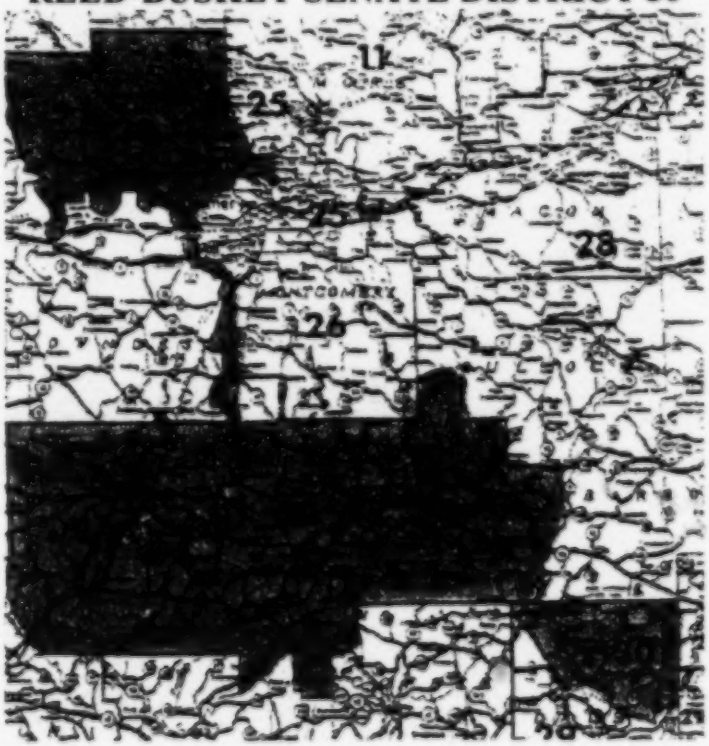
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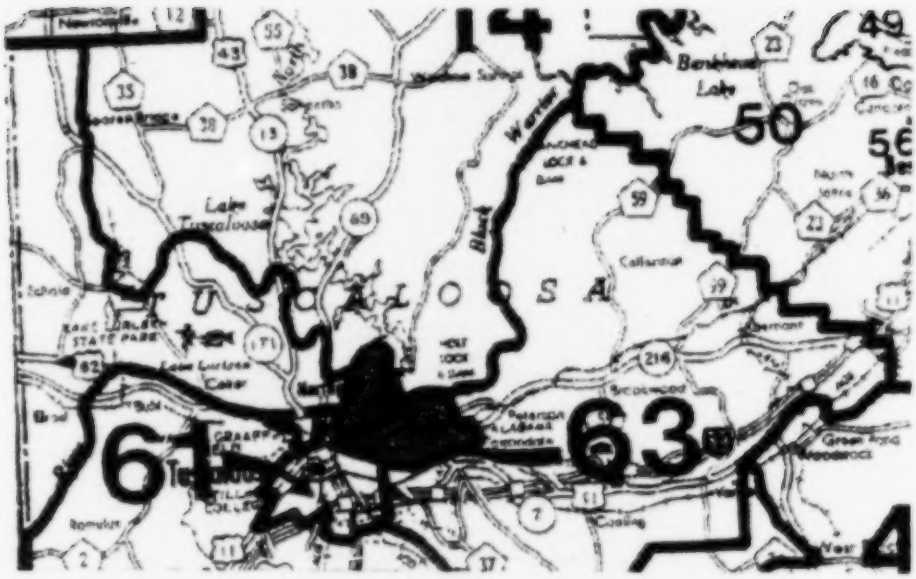
"OLD" SENATE DISTRICT 30



REED-BUSKEY SENATE DISTRICT 30



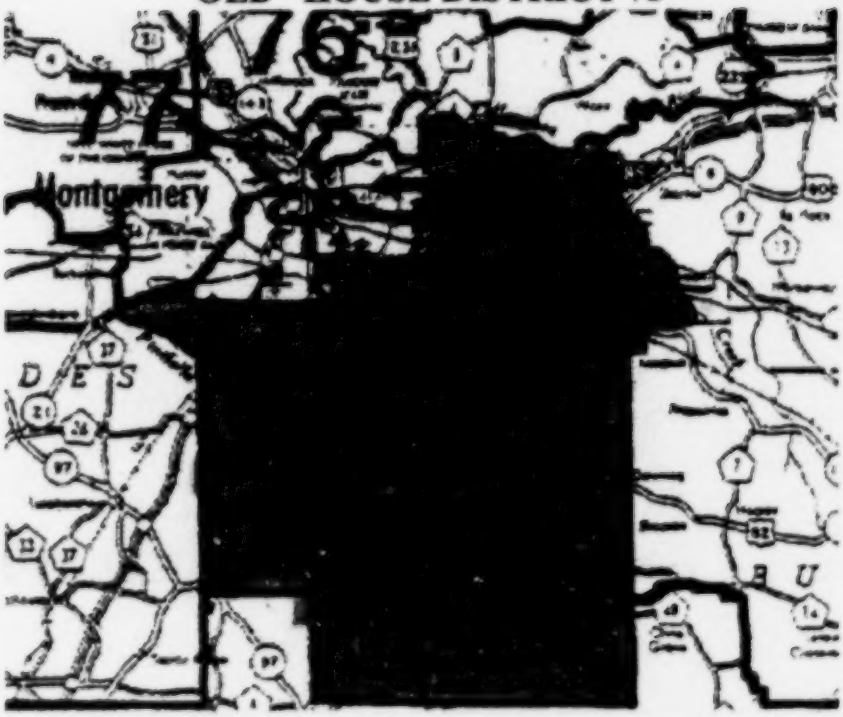
"OLD" HOUSE DISTRICT 63



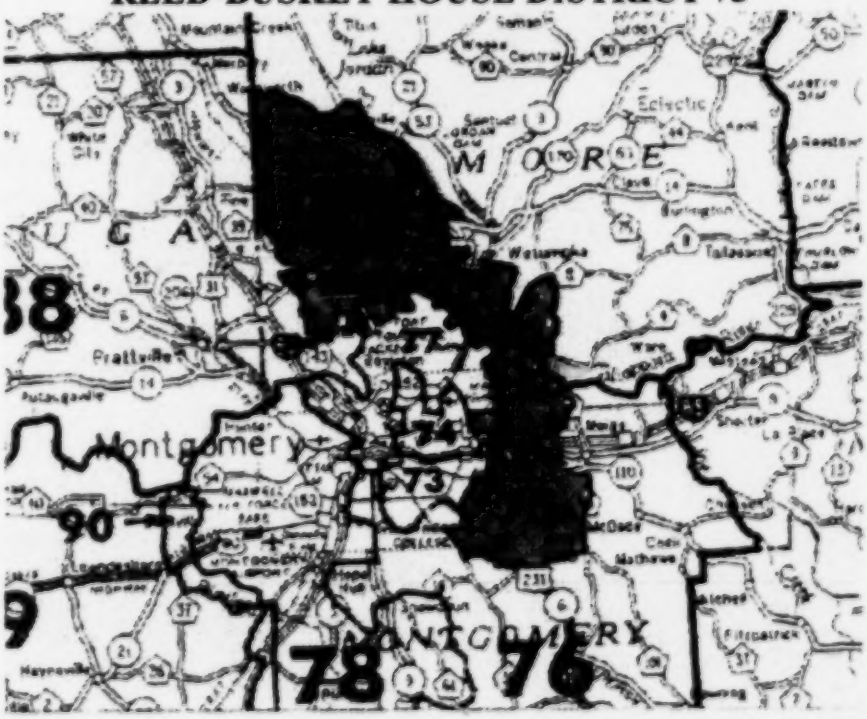
REED-BUSKEY HOUSE DISTRICT 63



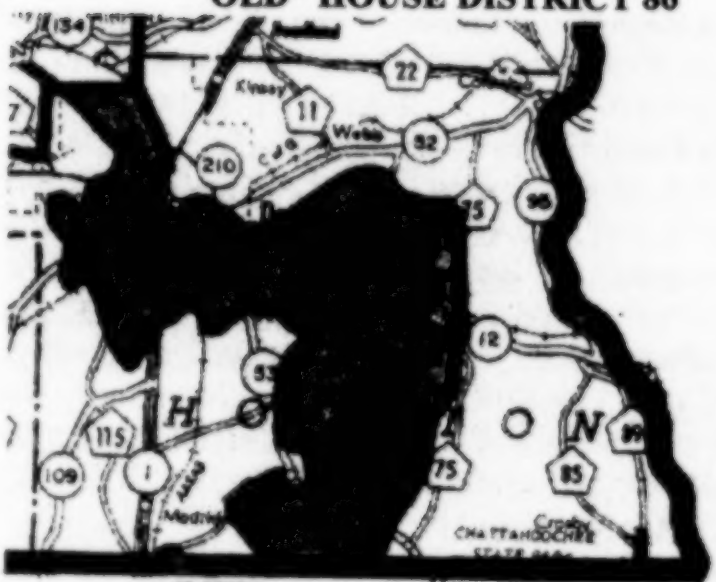
"OLD" HOUSE DISTRICT 75



REED-BUSKEY HOUSE DISTRICT 75



"OLD" HOUSE DISTRICT 86



REED-BUSKEY HOUSE DISTRICT 86



IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

JOHN RICE and **CAMILLA L. RICE**, individually and on behalf of a class of non-African-American voters,	)	
Plaintiffs,	)	
v.	)	CA No. 97-A-715-E
HAL SMITH, in his official capacity as Probate Judge of Lee County, Alabama; **JAMES BENNETT**, in his official capacity as Secretary of State of Alabama; **DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON**, and **ANDREW HAYDEN**, individually and on behalf of African-American voters; and **STATE OF ALABAMA**,	)	
Defendants.	)	

STATE DEFENDANTS' RESPONSE TO
THE COURT'S ORDER OF NOVEMBER 21, 1997

The State Defendants, Hal Smith, in his official capacity as Probate Judge of Lee County, Alabama, James Bennett, in his official capacity as Secretary of State of Alabama, and

the State of Alabama, hereby respond to the Court's November 21, 1997 Order and state their position on the effect on this case of the order entered on November 20, 1997 by Judge Charles Price in the case of *Sinkfield v. Camp*, CV 93-689-PR. The State Defendants state their position as follows:

1. The State Court's decision regarding the Rice Plaintiffs' racial gerrymander claims constitutes res judicata as to the Rices' racial gerrymander claims asserted in this action. As a result, any claims challenging those legislative districts in which the Rices reside, Senate Districts 27 and 28 and House Districts 79 and 83, are barred by res judicata.

2. The State Court's decision regarding the Rice Plaintiffs' One-Person, One-Vote claim constitutes res judicata as to the Rices' One-Person, One-Vote claim in this action. Judge Price ruled that House District 92 is the only legislative district that has a population variance greater than 5%, an under population of 5.21%. Because the Rices are not residents of House District 92, they lack standing in that they cannot allege any injury they have suffered by the district's underpopulation. The same holds true for the plaintiffs the Rices seek to add in their amended complaints. None of the proposed new plaintiffs has standing to raise a One-Person, One-Vote claim as to House District 92 in that none of them resides in that district.

3. The State Court's decision regarding the Rice Plaintiffs' claim of vote dilution constitutes res judicata as to the Rices' vote dilution claims in this action. The State Court dismissed Camilla Rice's dilution claim for lack of standing, and dismissed John Rice's dilution claim insofar as it applied to any district other than those in which he lived. Consequently, any claims regarding Senate Districts 27 or 28 or House Districts 79 or 83 are barred by res judicata.

4. To the extent that the Rice Plaintiffs may seek review of the Judge Price's decision in whole or in part by this Court, such attempt is barred by the *Rooker-Feldman* doctrine. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 450 U.S. 462 (1983); *Williams v. Adkinson*, 792 F. Supp. 755 (M.D. Ala. 1992), *aff'd*, 987 F.2d 774 (11th Cir. 1993). The Rice Plaintiffs must seek such review in the Alabama Supreme Court.

5. To the extent that this Court allows additional plaintiffs to intervene in this action, this Court is under a duty to adjudicate the racial gerrymander and vote dilution claims of any plaintiffs residing outside of Senate Districts 27 and 28 and House Districts 79 and 83. Under the authority of *United States v. Hays*, 115 S.Ct. 2431 (1995), and its progeny, for one to have standing to challenge the constitutionality of a legislative district, the claimant must be a resident of the challenged district. For this reason, the Rices' constitutional challenge was limited in state court to those districts in which they reside. Under *Hays*, the Rices lacked standing to challenge any other districts. Although this Court was without authority to require the Rices to intervene in the state court case of *Sinkfield v. Camp*, the Rices chose to voluntarily intervene rather than challenging this Court's order. By intervening, the Rices have now had their claims fully adjudicated as to their districts. However, those plaintiffs residing outside the Rices' legislative districts have not had the constitutionality of their districts determined. While the State Defendants would prefer that this action be completely foreclosed by the state court decision, they do not believe that the State Court is empowered to adjudicate the claims of persons not before it.

Respectfully submitted,

BILL PRYOR
ATTORNEY GENERAL

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One of the Attorneys for
the State Defendants
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Assistant Attorney General
Stanley E. Graham
Assistant Attorney General
Charles E. Grainger, Jr.
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has this the 25th day of November 1997 been furnished by United States Mail to the following:

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/s/ Stanley E. Graham
OF COUNSEL

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

ANDREW D. THOMPSON, JR., et al.	)
	)
v.	) CIVIL ACTION
	) 97-A-715E
HAL SMITH, JAMES BENNETT, et al.	) Montgomery, Alabama) January 18-25, 2000
DARRYL SINKFIELD, et al.	)
Defendants.	)

* * *

TRIAL TESTIMONY OF DR. JOE L. REED
JANUARY 18, 1999

* * *

[60] JUDGE ALBRITTON: Let me interrupt you a minute. He has asked this several times. He is not asking you with this question to say why you did anything or who you [61] talked to. He is just simply asking you was the race data on the computer screen when you were doing it. If it wasn't, fine. If it was, fine. If you don't know, fine. Just answer that.

A. Yes, the racial data is on the computer screen.

* * *

[64] Q. But when you were drawing those district lines for house district 63, were you conscious when you drew that house district 63 line that you were putting the majority

white populations in his house district 63 when you drew the district?

A. Yes, I knew when I was drafting these districts, one of districts was going to be black and the other was going to be white; majority black and majority white.

TABLE 2
Proportion of Total Population in Split Counties by Alabama County for the Reed-Buskey Court State Senate Plan of 1993

County	SD	Total	White	%	African-Amer.	%
Baldwin	22	17,534	13,166	75.1	4,121	23.5
Baldwin	32	80,746	71,399	88.4	8,519	10.6
Choctaw	22	10,091	7,566	75.0	2,508	24.9
Choctaw	23	5,927	1,347	22.7	4,569	77.1
Clarke	22	11,369	9,521	83.7	1,800	15.8
Clarke	23	15,871	6,006	37.8	9,825	61.9
Colbert	1	39,789	31,914	80.2	7,651	19.2
Colbert	6	11,877	10,906	91.8	917	7.7
Conecuh	22	8,869	6,295	71.0	2,522	28.4
Conecuh	23	5,185	1,768	34.1	3,403	65.6
Dale	29	20,026	13,491	67.4	5,745	28.7
Dale	30	8,967	8,218	91.6	691	7.7
Dale	31	20,640	17,656	85.5	2,411	11.7
DeKalb	8	40,305	39,206	97.3	610	1.5
DeKalb	9	9,788	9,686	99.0	16	0.2
DeKalb	13	4,558	4,088	89.7	402	8.8
Elmore	11	25,937	20,356	78.5	5,448	21.0
Elmore	25	20,894	15,508	74.2	5,221	25.0

County	SD	Total	White	%	African-Amer.	%
Elmore	30	2,379	1,986	83.5	370	15.6
Hale	21	2,703	2,002	74.1	694	25.7
Hale	24	12,795	4,253	33.2	8,520	66.6
Henry	28	11,168	8,476	75.9	2,638	23.6
Henry	29	4,206	1,442	34.3	2,757	65.5
Houston	29	65,330	47,645	72.9	17,036	26.1
Houston	31	16,001	13,868	86.7	1,918	12.0
Jefferson	5	36,239	33,978	93.8	2,136	5.9
Jefferson	15	111,830	102,777	91.9	8,277	7.4
Jefferson	16	94,804	90,749	95.7	2,643	2.8
Jefferson	17	78,546	75,305	95.9	2,958	3.8
Jefferson	18	110,075	36,179	32.9	72,528	65.9
Jefferson	19	110,021	40,378	36.7	69,313	63.0
Jefferson	20	110,010	38,951	35.4	70,716	64.3
Lee	13	10,671	9,116	85.4	1,520	14.2
Lee	27	53,910	47,009	87.2	5,355	9.9
Lee	28	22,475	8,764	39.0	13,532	60.2
Lowndes	23	11,491	2,256	19.6	9,218	80.2
Lowndes	30	1,167	929	79.6	238	20.4
Madison	2	53,837	44,002	81.7	8,264	15.4
Madison	4	40,264	35,810	88.9	2,527	6.3
Madison	7	117,162	78,908	67.3	35,578	30.4
Madison	8	27,649	25,477	92.1	1,747	6.3

County	SD	Total	White	%	African-Amer.	%
Marengo	23	3,987	2,977	74.7	1,008	25.3
Marengo	24	19,097	8,337	43.7	10,737	56.2
Mobile	32	36,675	31,068	84.7	4,753	13.0
Mobile	33	110,147	37,511	34.1	71,973	65.3
Mobile	34	118,515	106,008	89.4	10,098	8.5
Mobile	35	113,306	80,266	70.8	31,048	27.4
Monroe	22	17,547	12,888	73.4	4,403	25.1
Monroe	23	6,421	1,432	22.3	4,969	77.4
Montgomery	25	98,760	87,502	88.6	9,713	9.8
Montgomery	26	110,325	31,918	28.9	77,599	70.3
Morgan	2	8,621	8,363	97.0	161	1.9
Morgan	3	79,647	69,088	86.7	9,876	12.4
Morgan	4	11,775	11,671	99.1	44	0.4
Pickens	6	3,096	1,672	54.0	1,419	45.8
Pickens	21	17,603	10,330	58.9	7,226	41.0
Russell	27	26,819	22,149	82.6	4,486	16.7
Russell	28	20,041	6,324	31.5	13,602	67.9
St. Clair	10	12,371	11,553	93.4	690	5.6
St. Clair	17	37,638	33,585	89.2	3,871	10.3
Shelby	5	3,695	3,404	92.1	269	7.3
Shelby	14	70,433	62,929	89.3	6,950	9.9
Shelby	16	25,230	24,382	96.6	499	2.0

County	SD	Total	White	%	African-Amer.	%
Tuscaloosa	5	10,242	9,914	96.8	279	2.7
Tuscaloosa	21	99,137	84,957	85.7	12,838	12.9
Tuscaloosa	24	41,143	14,527	35.3	26,260	63.8
Winston	3	8,838	8,755	99.1	49	0.5
Winston	5	2,659	2,653	99.8	1	0.0
Winston	6	10,556	10,517	99.6	7	0.1

TABLE 5

Proportion of Total Population in Split Municipalities and Census Designated places by City or Town for the Reed-Buskey Court State Senate Plan of 1993

City/Town	SD	Total	Non-Af. Amer.	%	African-Amer.	%
Abbeville	28	1,595	1,445	90.6	150	9.4
Abbeville	29	1,578	613	38.8	965	61.2
Daleville	29	2,016	1,490	73.9	526	26.1
Daleville	31	3,101	2,751	88.7	350	11.3
Dothan	29	37,672	24,950	66.2	12,722	33.8
Dothan	31	15,928	14,011	88.0	1,917	12.0
Fort Deposit	23	935	129	13.8	806	86.2
Fort Deposit	30	305	275	90.2	30	9.8
Headland	28	2,227	1,984	89.1	243	10.9
Headland	29	1,039	194	18.7	845	81.3
Millbrook	25	5,804	4,872	83.9	932	16.1
Millbrook	30	246	186	75.6	60	24.4
Mobile	32	30	23	76.7	7	23.3
Mobile	33	70,195	24,425	34.8	45,770	65.2
Mobile	34	73,131	65,438	89.5	7,693	10.5
Mobile	35	52,922	29,985	56.7	22,937	43.3
Montgomery	25	93,735	84,816	90.5	8,919	9.5
Montgomery	26	93,371	23,073	24.7	70,298	75.3

City/Town	SD	Total	Non-Af. Amer.	%	African-Amer.	%
Moundville	21	1,345	1,010	75.1	335	24.9
Moundville	24	3	0	0.0	3	100.0
Newton	29	67	66	98.5	1	1.5
Newton	30	6	6	100.0	0	0.0
Newton	31	1,507	1,300	86.3	207	13.7
Northport	5	745	733	98.4	12	1.6
Northport	21	14,683	12,112	82.5	2,571	17.5
Northport	24	1,938	557	28.7	1,381	71.3
Ozark	29	7,515	4,826	64.2	2,689	35.8
Ozark	30	1,761	1,694	96.2	67	3.8
Ozark	31	3,646	3,237	88.8	409	11.2
Tuscaloosa	5	54	54	100.0	0	0.0
Tuscaloosa	21	44,675	38,260	85.6	6,415	14.4
Tuscaloosa	24	33,147	11,903	35.9	21,244	64.1

Source: Alabama State Legislature, Place Population by District Report. All information is based on that in the State Legislature's apportionment system.

TABLE 6

Proportion of Total Population in Split Municipalities and Census Designated places by City or Town for the Reed-Buskey Court State House Plan of 1993

City/Town	HD	Total	Non-Af. Amer.	%	African-Amer.	%
Dothan	85	10,809	1,041	9.6	9,768	90.4
Dothan	86	20,028	17,532	86.6	2,676	13.4
Dothan	87	6,835	6,557	95.9	278	4.1
Dothan	93	15,928	14,011	88.0	1,917	12.0
Kinsey	85	1,528	1,102	72.1	426	27.9
Kinsey	86	151	143	94.7	8	5.3
Millbrook	75	5,804	4,872	83.9	932	16.1
Millbrook	88	246	186	75.6	60	24.4
Montgomery	73	40,396	36,146	89.5	4,250	10.5
Montgomery	74	39,568	36,842	93.1	2,726	6.9
Montgomery	75	13,771	11,822	85.8	1,949	14.2
Montgomery	76	26,407	7,247	27.4	19,160	72.6
Montgomery	77	35,770	9,748	27.3	26,022	72.7
Montgomery	78	31,194	6,078	19.5	25,116	80.5
Newton	85	67	66	98.5	1	1.5
Newton	89	6	6	100.0	0	0.0
Newton	93	1,507	1,300	86.3	207	13.7
Northport	14	745	733	98.4	12	1.6
Northport	61	13,148	10,907	83.0	2,241	17.0
Northport	63	1,535	1,205	78.5	330	21.5

City/Town	HD	Total	Non-Af. Amer.	%	African-Amer.	%
Northport	70	1,938	557	28.7	1,381	71.3
Ozark	85	7,515	4,826	64.2	2,689	35.8
Ozark	89	1,761	1,694	96.2	67	3.8
Ozark	93	3,646	3,237	88.8	409	11.2
Taylor	86	94	94	100.0	0	0.0
Taylor	87	1,258	1,234	98.1	24	1.9
Tuscaloosa	14	54	54	100.0	0	0.0
Tuscaloosa	61	220	168	76.4	52	23.6
Tuscaloosa	62	11,923	9,667	81.1	2,256	18.9
Tuscaloosa	63	32,532	28,425	87.4	4,107	12.6
Tuscaloosa	70	33,107	11,880	35.9	21,227	64.1
Tuscaloosa	72	40	23	57.5	17	42.5

Source: Alabama State Legislature, Place Population by District Report. All information is based on that in the State Legislature's apportionment system.

No. 00-133

In The

Supreme Court of the United States

JAMES BENNETT, in his official capacity as Secretary of State of Alabama, et al.,

Appellants,

v.

PEGGY KELLEY, et al.,

Appellees.

On Appeal From The United States District Court For The Middle District Of Alabama

BRIEF OF JAMES BENNETT AND THE STATE OF ALABAMA IN OPPOSITION TO MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO AFFIRM

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BRIEF IN OPPOSITION

This case presents important questions of federal law that are likely to recur in the next round of redistricting litigation. It involves *Shaw*-based challenges to the districting plan for the Alabama Legislature and raises questions of standing, laches, mootness, the absence of meaningful relief, and sufficiency. The next redistricting cycle will begin in January 2001, when the Census Bureau begins to distribute the results of the 2000 Census to the States. Alabama should have its results no later than April 1, 2001. *See* 13 U.S.C. § 141(c) (1994). The Alabama Legislature will then have the opportunity to redraw its district lines, and the population changes over the past decade make it highly unlikely that any of the districts, much less those the District Court has declared unconstitutional, will continue to look like they do now. Nonetheless, the District Court told the Alabama Legislature not to use the same lines for seven districts in the new plan.

In the litigation that is almost certain to follow the States' next attempts to reapportion and redistrict, the parties and the courts will confront the issues presented by this appeal.[1] More particularly, they will have to determine:

- Whether a mere allegation of residence in a district is sufficient to establish standing or whether, as this Court held in *United States v. Hays*, 515 U.S. 737, 739 (1995), the allegation of residence is sufficient only when the plaintiff shows that the district in which he or she resides is the "primary focus" of the claim;

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[1] While this case involves a State legislature, the Court's guidance will be of equal assistance to the multitude of State, county, municipal, and other governmental bodies that elect their members from single-member districts.

- Whether, after a certain point in each decade, prudential bars such as laches, mootness, and the inability to offer meaningful relief can be invoked to defer adjudication of *Shaw* claims until after a State redistricts to reflect the results of a new Census; and
- Under what circumstances a court may disregard the race-neutral explanations of district lines offered by incumbent legislators.

This case offers the Court the opportunity to provide clear, timely guidance to the parties and the courts that will be involved in the litigation to follow. Accordingly, this Court should deny the Kelley Plaintiffs' "Motion to Dismiss, or in the Alternative to Affirm," and note probable jurisdiction.

1. The District Court misread the elements of standing under *United States v. Hays*. Contrary to the Kelley Plaintiffs' contention, Motion at 9, the District Court did not "adopt[ ] a straightforward reading of *Hays*. . . . " Rather, the District Court acknowledged that its approach "admittedly conflates Article III jurisdiction with the merits, a situation not often encountered." App. at 5a. The fact that such conflation is "a situation not often encountered," *id.*, shows that the District Court's approach is not "a straightforward reading of *Hays*." Instead, the District Court abandoned the "primary focus" inquiry mandated by *Hays* after reading the complaint and allowed the Kelley Plaintiffs to attack districts in which they do not reside.

The Reed-Buskey Plan included a number of new or redesigned black-majority districts which adjoin the districts in which the Kelley Plaintiffs live. As the dissenting judge explains:

> The creation of these majority-black districts necessarily caused the neighboring districts to change shape, admittedly substantially at times, and resulting in rather irregular boundaries. Nonetheless, the only sense in which the plaintiffs object to the way their own districts were

> drawn is insofar as their districts represent the negative space out of which the objectionable majority-black districts were carved.

App. at 63a (Thompson, J., dissenting). The majority opinion displays the dissent's reasoning in several places:

- SD 25/HD 63 in the Tuscaloosa area "felt the repercussions of Dr. Reed's strategy. . . . " App. at 28a;
- "[W]ithout excising black Tuscaloosa area population from SD 21 to give it its squashed-butterfly shape, Dr. Reed could not have created the new SD 24." App. at 32a;
- The shape of SD 30 is explained by the need to preserve Lowndes County's black population for two majority-black Senate districts, SD 23 and 24. App. at 37a;
- "Being on HD 85's periphery puts HDs 86 and 89 within the zone of the effects of HD 85." App. at 41a; and
- HD 86 was affected by HD 85. App. at 42a.

As these citations show, the District Court adjudicated "ripple effect" claims, the primary focus of which was *not* the districts in which the Kelley Plaintiffs reside, but, rather, adjoining black-majority districts in which they do not reside.

This Court precluded such ripple effect claims in *Hays*, when it declared that reliance on the demographics of neighboring districts does not establish standing to bring a *Shaw* claim. *See* 515 U.S. at 746. The District Court failed to give any meaning to this portion of *Hays*. Accordingly, this Court should review the District Court's treatment of *Hays*.

2. The Kelley Plaintiffs' contention that laches does not bar their claims is incorrect. At the outset, Bennett and the State note that laches applies to redistricting claims. *See, e.g., Chandler v. Harris*, 120 S. Ct. 1716 (2000), *summarily aff'g Fouts v. Harris*, 88 F. Supp. 2d 1351 (S.D. Fla. 1999) (three-judge court) (dismissing *Shaw*

claims on ground of laches). The Kelley Plaintiffs' reliance on *Shuford v. Alabama State Board of Education*, 920 F. Supp. 1233, 1239 (M.D. Ala. 1996), Motion at 21, is misplaced because *Shuford* was a Section 5 case, and the passage of time is no bar to § 5 actions. *See Lopez v. Monterrey County*, 519 U.S. 9, 22-23 (1996). Entirely different considerations apply to *Shaw* claims.

Laches applies to the Kelley Plaintiffs' claims because they have never explained what took them until August 29, 1997, to move to intervene in the Rices' lawsuit. All of the law they needed to make their claim was in place by the end of June 1995. By that time, this Court had rendered decisions that: (1) established a cause of action for racial gerrymandering, *Shaw v. Reno*, 509 U.S. 630 (1993); (2) established the elements of standing, *Hays* (1995); and (3) established the elements of proof for *Shaw* claims, *Miller v. Johnson*, 515 U.S. 900 (1995). Had the Kelley Plaintiffs filed in 1995, the Alabama Legislature would have had the sessions of 1996 and 1997 to devise a remedy in time for the 1998 election cycle. Instead, by the time the Kelley Plaintiffs moved to intervene, the 1997 session was over, and a special session would have been necessary to avoid disrupting the 1998 cycle. Orderly administration of that cycle called for candidates to file their qualifying paperwork in early April 1998. *See* Ala. Code § 17-16-11(a)(1) (1995). Thus, by their unexplained delay, the Kelley Plaintiffs effectively (and, perhaps, intentionally) took the Alabama Legislature out of the picture.

The Kelley Plaintiffs' suggestions that the State and Bennett were responsible for the delay thereafter, and that there has been no prejudice, lack merit. As for the delay, which the Kelley Plaintiffs attribute to Bennett's and the State's defense of the plan, Motion at 19, a vigorous defense was justified. The State Defendants note that they prevailed entirely on two of the three original claims and, in whole or in part, as to several plaintiffs on

their *Shaw* claims. *See* Bennett J.S. at 6. As for prejudice, the District Court has inserted itself unnecessarily into the next round of the State's redistricting and has directed that the State pay attorneys' fees. None of that is necessary now.

Indeed, as the three-judge court observed in *Maxwell v. Foster*, Civil Action No. 93-1378, slip op. at 9 (W.D. La. Nov. 24, 1999) (three-judge court), laches is not a "permanent barrier" to claims.[2] Rather, it simply defers judicial consideration of them until a time when relief can effectively be ordered. The District Court should have deferred its consideration of the Kelley Plaintiffs' claims until the Alabama Legislature drew a new plan using the results of the 2000 Census or failed to reapportion itself.

3. The Kelley Plaintiffs fail to show why they should not be bound by the Alabama Supreme Court's holding that similar *Shaw*-based claims against other districts in the same plan were moot.[3] In their Jurisdictional Statement, Bennett and the State showed that the Alabama Supreme Court dismissed the appeals of John and Camilla Rice because those appeals were moot. *See* Bennett J.S. at 22-24; App. at 197a-200a. The Rices did not petition this Court for certiorari, so that holding was final before the District Court heard the claims of the Kelley Plaintiffs. The District Court rejected the contention that the Alabama Supreme Court's holding of mootness should be applied to the Kelley Plaintiffs' claims, reasoning that the Alabama Supreme Court had not been asked

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[2] A copy of the Order Granting Defendants' Motion for Summary Judgment in *Maxwell* has been lodged with the Clerk of the Court.

[3] Bennett and the State suggest that, because this case is moot, the Court should vacate the judgment of the District Court and remand the case with instructions to dismiss. *See Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

to consider a special election as a remedy and had applied state law. *See* App. at 11a-12a.

The Kelley Plaintiffs' reliance on the District Court's report that different remedies were at issue is misplaced because that report is clearly erroneous. In the Alabama Supreme Court, Bennett and the State contended, *inter alia*, that "the trial court's judgment should be vacated and this case dismissed as moot." App. at 345a (capitalization altered). In their Reply Brief, John and Camilla Rice argued, *inter alia*, that

> at any time between now and the time when the results for the next decennial census are made available to the state for redistricting purposes, *a special election may be required in any House or Senate district*. As unfortunate as it is to discuss, the death of a legislator requires that a special election be held in the district represented by that deceased legislator.

App. at 359a-360a (emphasis added).[4] Thus, the Alabama Supreme Court had before it the contention that a special election could be required, but held the claims moot nonetheless.

In so doing, the Alabama Supreme Court did not apply Alabama law, as the Kelley Plaintiffs now suggest. Rather, the Alabama Supreme Court noted that *this Court* had recognized "several exceptions to the *federal* doctrine of mootness," but the Alabama court found them inapplicable. App. at 199a-200a n.1 (emphasis added). If the Rices wanted to challenge this reasoning, they should have petitioned for certiorari. In *Liner v. Jefco, Inc.*, 375 U.S. 301, 304 (1964), this Court reviewed and set aside an intermediate state court's holding of mootness, but did so on direct, certiorari review. *Liner* is not an exception to

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[4] Pursuant to an Order from the District Court, the Kelley Plaintiffs filed both of these Briefs and other Alabama Supreme Court pleadings with the District Court.

the *Rooker-Feldman* doctrine,[5] as the Kelley Plaintiffs suggest.

The District Court, however, second-guessed the Alabama Supreme Court's ruling on mootness. As noted, its factual predicate for doing so is clearly erroneous. Separate and apart from that factual error, the District Court should have respected the *Rooker-Feldman* doctrine and applied the Alabama Supreme Court's conclusion of mootness to the Kelley Plaintiffs. In every material respect, the Kelley Plaintiffs were indistinguishable from John and Camilla Rice: They all wanted to challenge districts that the State used for the final time in 1998.

The Kelley Plaintiffs' reliance on *Reno v. Bossier Parish School Board*, 120 S. Ct. 866 (2000), to avoid mootness is misplaced.[6] That case involved claims under Section 5 of the Voting Rights Act, not *Shaw* claims. As noted above, Section 5 claims are fundamentally different. Moreover, the Kelley Plaintiffs' attempt to use collateral consequences as a trump threatens to open the door to more end-of-decade redistricting litigation that conflicts with the State's expectations of quiet before the storm of post-Census litigation. Finally, as white residents of white-majority districts in a white-majority state, the Kelley Plaintiffs lack standing to raise retrogression. *See* 28 C.F.R. § 51.54(a) (1999).

4. The Kelley Plaintiffs do not show that the District Court granted meaningful relief. In this case, the District Court declared that no further elections could be conducted in seven districts as currently drawn, but did not direct that those districts be redrawn or that a special election be conducted. *See* App. at 51a-52a. The dissenting judge correctly criticized this relief as "curious," *id.* at

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[5] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

[6] The Kelley Plaintiffs said nothing about retrogression until post-trial oral argument on January 25, 2000.

71a, "empty," *id.* at 72a, and "non-substantive," *id.* at 74a. (Thompson, J., dissenting). As he explained, the majority's decision not to order special elections meant that "[o]ne day, one month, and even one year, after the court enters its final order today [*i.e.*, April 24, 2000], the status quo will remain; nothing will have changed." App. at 73a (Thompson, J., dissenting).

The emptiness of the relief granted shows that an essential element of justiciability is missing. In *Vermont Agency of Natural Resources v. United States*, this Court reiterated that "redressability" is an element of standing. 120 S. Ct. 1858, 1861-62 (2000). It defined "redressability" as "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1976)). The relief granted in this case does not meet that standard for two reasons. First, as the dissenting judge observes, the plaintiffs receive no tangible, immediate benefit from the District Court's ruling. *See* App. at 71a (Thompson, J., dissenting) ("[I]f these districts are really racially gerrymandered the injury is ongoing and persists as long as the districts remain in place. . . . "). Second, any delayed gratification will not result from the District Court's ruling, but, rather, from the State's preexisting constitutional obligation to redistrict.

The Kelley Plaintiffs' characterization of the State's and Bennett's argument as inconsistent is misguided. Whenever a federal court tells a State agency or official to do something, it acts intrusively. If, as here, the District Court has imposed "no substantive relief at all," App. at 70a (Thompson, J., dissenting), it has acted intrusively without any justification for having done so.

5. The Kelley Plaintiffs' pessimism about the Alabama Legislature's ability to adopt a redistricting plan next year does not justify the exercise of hypothetical jurisdiction. Bennett and the State disagree with a fundamental premise of the Kelley Plaintiffs' argument. They

point to the Alabama Legislature's history of being unable to devise redistricting plans and contend that the District Court had to intervene now because the post-2000 redistricting will be no different. The Kelley Plaintiffs' conclusion does not follow from their premise. If the Legislature cannot devise a new plan for the 2002 elections, the old plan cannot be used because it will violate constitutional one-person-one-vote principles. For example, the incumbent in HD 75 testified that the population of his district has grown dramatically since 1990. Maintaining HD 75's current shape for the next Legislative elections would violate one-person-one-vote standards. Any such election could be enjoined, and litigation seeking such an injunction would be filed as soon as it became clear that no plan would be forthcoming from the Legislature. Until that happens, Bennett and the State believe the courts must assume that the Legislature will perform its constitutionally mandated duty. To predicate relief on a pessimistic belief that the Legislature will fail is speculative. *See* App. at 70a (Thompson, J., dissenting).

In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998), this Court observed, "Hypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." One way or another, the present district lines are unlikely to be used again after 2001; either the Legislature will change them to reflect the Census results, or the courts will enjoin an election and devise a remedy. The pessimism reflected in the Kelley Plaintiffs' brief has driven the District Court to return an advisory opinion.

6. This Court should review the District Court's conclusions regarding sufficiency of the evidence to ensure that the Kelley Plaintiffs met their heavy burden of proof. In particular, the District Court improperly disregarded race-neutral explanations of district lines offered by Senator Wendell Mitchell, the incumbent in SD

30, and Representatives Phil Poole and Bryant Melton, who represent districts in the Tuscaloosa area, two of which (SD 25 and HD 63) were declared unconstitutional. The District Court should have considered whether the Kelley Plaintiffs had carried their burden to show those explanations to be pretextual before rejecting them. *Cf. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) ("[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason [is] false, and that discrimination [is] the real reason."). The Kelley Plaintiffs did not carry that burden.

CONCLUSION

For the reasons stated in the Jurisdictional Statement of Bennett and the State and this Brief in Opposition, this Court should deny the "Motion to Dismiss, or in the Alternative to Affirm," and note probable jurisdiction or, in the alternative, summarily reverse the District Court's judgment.

Respectfully submitted,

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Per Curiam

SUPREME COURT OF THE UNITED STATES

DARRYL SINKFIELD ET AL.

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00–133 *v.*

PEGGY C. KELLEY ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

Nos. 00–132 and 00–133. Decided November 27, 2000

PER CURIAM.

These cases involve a challenge to Alabama state legislative districts under the equal protection principles announced by this Court in *Shaw* v. *Reno*, 509 U. S. 630 (1993). Appellees, the plaintiffs below, are white Alabama voters who are residents of various majority-white districts. The districts in which appellees reside are adjacent to majority-minority districts. All of the districts were created under a state redistricting plan whose acknowledged purpose was the maximization of the number of majority-minority districts in Alabama. Appellants in No. 00–132 are a group of African-American voters whose initial state lawsuit resulted in the adoption of the redistricting plan at issue. Appellants in No. 00–133 are Alabama state officials.

Appellees brought suit in the United States District Court for the Middle District of Alabama challenging their own districts as the products of unconstitutional racial gerrymandering. A three-judge court convened to hear the case pursuant to 28 U. S. C. §2284. The District Court ultimately held that seven of the challenged majority-

white districts were the product of unconstitutional racial gerrymandering and enjoined their use in any election. 96 F. Supp. 2d 1301 (MD Ala. 2000). On direct appeal to this Court pursuant to 28 U. S. C. §1253, appellants in both cases contend, among other things, that appellees lack standing to maintain this suit under our decision in *United States* v. *Hays*, 515 U. S. 737 (1995). We agree.

Hays involved a challenge to Louisiana's districting plan for its Board of Elementary and Secondary Education. The plan contained two majority-minority districts. The appellees lived in a majority-white district that bordered on one of the majority-minority districts. The appellees challenged the entire plan, including their own district, as an unconstitutional racial gerrymander under our decision in *Shaw* v. *Reno*, *supra*. *United States* v. *Hays*, 515 U. S., at 739–742.

We concluded that the appellees lacked standing to maintain their challenge. We assumed for the sake of argument that the evidence was sufficient to state a *Shaw* claim with respect to the neighboring majority-minority district. *Id.*, at 746. But we concluded that the appellees had not shown a cognizable injury under the Fourteenth Amendment because they did not reside in the majority-minority district and had not otherwise shown that they had "*personally* been denied equal treatment." *Id.*, at 744–746, 746 (internal quotation marks omitted). The appellees' failure to show the requisite injury, we noted, was not changed by the fact that the racial composition of their own district might have been different had the legislature drawn the adjacent majority-minority district another way. *Id.*, at 746.

Appellees' position here is essentially indistinguishable from that of the appellees in *Hays*. Appellees are challenging their own majority-white districts as the product of unconstitutional racial gerrymandering under a redistricting plan whose purpose was the creation of majority-

minority districts, some of which border appellees' districts. Like the appellees in *Hays*, they have neither alleged nor produced any evidence that any of them was assigned to his or her district as a direct result of having "personally been subjected to a racial classification." *Id.*, at 745; see also *Shaw* v. *Hunt*, 517 U. S. 899, 904 (1996). Rather, appellees suggest that they are entitled to a presumption of injury-in-fact because the bizarre shapes of their districts reveal that the districts were the product of an unconstitutional racial gerrymander. See App. to Pet. for Cert. 120a, 148a, 153a.

The shapes of appellees' districts, however, were necessarily influenced by the shapes of the majority-minority districts upon which they border, and appellees have produced no evidence that anything other than the deliberate creation of those majority-minority districts is responsible for the districting lines of which they complain. Appellees' suggestion thus boils down to the claim that an unconstitutional use of race in drawing the boundaries of majority-minority districts necessarily involves an unconstitutional use of race in drawing the boundaries of neighboring majority-white districts. We rejected that argument in *Hays*, explaining that evidence sufficient to support a *Shaw* claim with respect to a majority-minority district did "not prove anything" with respect to a neighboring majority-white district in which the appellees resided. *United States* v. *Hays*, 515 U. S., at 746. Accordingly, "an allegation to that effect does not allege a cognizable injury under the Fourteenth Amendment." *Ibid.*

The judgment of the District Court is vacated, and the cases are remanded with instructions to dismiss the complaint.

It is so ordered.